Supreme Court, U.S.
FILED
07-962 JAN 18 2008
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Case No. 07-____

IN THE
Supreme Court of the United States

CAVEL INTERNATIONAL, INC., *et al.*,

Petitioners,

v.

LISA MADIGAN, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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January 18, 2008

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QUESTIONS PRESENTED

1. Whether Congress's plenary power "to regulate Commerce with foreign Nations, and among the several States" invalidates a state statute that outlaws all commerce from the United States in an otherwise lawful product intended solely for export overseas.

2. Where a state is unable to articulate a defensible interest to justify the burden on foreign commerce imposed by a law, whether a court may substitute its own rationale unsupported in either the court or legislative record to uphold the statute's constitutionality.

LIST OF PARTIES

In the court below, Cavel International, Inc. and the following eleven of its employees were the Plaintiffs-Appellants: James D. Tucker, Randy Beasley, Angela Fabris, Ruben Gonzalez, Brad D. Melville, Amparo Milan, Raul Milan, Raul Escutia Milan, Roberto Resendiz, Ron Warner, and Isaac Zamora.

The Defendants-Appellees were Lisa Madigan, in her official capacity as Illinois Attorney General; Ron Matekaitis, in his official capacity as State's Attorney for DeKalb County, Illinois; and Charles A. Hartke, in his official capacity as Director of the Illinois Department of Agriculture. Illinois Governor Rod Blagojevich was initially a defendant in the district court, but was voluntarily dismissed without prejudice.

STATEMENT REQUIRED BY RULE 29.6

The parent company of Cavel International, Inc. is Van Dammc Holding Company, Inc., which is privately held. There is no public company that owns 10% or more of Cavel International, Inc.'s stock.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Cavel International, Inc., James D. Tucker, Randy Beasley, Angela Fabris, Ruben Gonzalez, Brad D. Melville, Amparo Milan, Raul Milan, Raul Escutia Milan, Roberto Resendiz, Ron Warner, and Isaac Zamora respectfully request that this Court grant their petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 500 F.3d 551 (7th Cir. 2007) and appears in the appendix of this petition ("Pet. App.") at 1a–15a. The Seventh Circuit also granted an injunction pending appeal and issued opinions that are reported at 500 F.3d 544 (7th Cir. 2007); Pet. App. 43a–55a. The decision of the United States District Court for the Northern District of Illinois is unreported, but appears at Pet. App. 16a–42a.

JURISDICTION

The court of appeals entered judgment on September 21, 2007. On December 6, 2007, Justice Stevens signed an order extending the time to file this petition for a writ of certiorari to and including January 18, 2008 in Application No. 07A474. The Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause of the United States Constitution provides that Congress shall have the power "[t]o regulate Commerce with foreign Nations,

and among the several States, and with the Indian Tribes[.]" U.S. Const. art. I, § 8, cl. 3.

Section 5 of Illinois House Bill 1711, signed into law as Illinois Public Act 95-0002 (collectively, "H.B. 1711") provides:

> Section 5. The Illinois Horse Meat Act is amended by adding Section 1.5 as follows:
>
> (225 ILCS 635/1.5 new)
>
> Sec. 1.5. Slaughter for human consumption unlawful.
>
> (a) Notwithstanding any other provision of law, it is unlawful for any person to slaughter a horse if that person knows or should know that any of the horse meat will be used for human consumption.
>
> (b) Notwithstanding any other provision of law, it is unlawful for any person to possess, to import into or export from this State, or to sell, buy, give away, hold, or accept any horse meat if that person knows or should know that the horse meat will be used for human consumption.
>
> (c) Any person who knowingly violates any of the provisions of this Section is guilty of a Class C misdemeanor.
>
> (d) This Section shall not apply to:

> (1) Any commonly accepted noncommercial, recreational, or sporting activity.
>
> (2) Any existing laws which relate to horse taxes or zoning.
>
> (3) The processing of food producing animals other than those of the equine genus.

The complete text of H.B. 1711 appears at Pet. App. 56a–61a.

STATEMENT OF THE CASE

This case presents important questions of federal constitutional law under the Foreign Commerce Clause, as to which this Court's guidance is needed to resolve disagreements among the lower courts and to clarify the limits the federal Constitution places on state laws restricting the foreign commerce of the United States. In the decision below, the Seventh Circuit upheld the constitutionality of a state law that has the effect of halting *all* foreign commerce from the United States in an otherwise wholesome food product, even though the state's interest in enacting the statute remains unclear, if indeed it has an interest at all.

H.B. 1711, enacted by the State of Illinois on May 24, 2007, criminalizes commercial activity related to the slaughter of horses and the export of their meat for human consumption abroad – a business in which Petitioner Cavel International had been lawfully engaged in DeKalb, Illinois for more than twenty years. Although horsemeat is no longer generally consumed in this country, it is a delicacy in countries

such as Belgium, France, Italy, and Japan. At its DeKalb plant, Cavel processed horsemeat for human consumption solely for export to these and other nations overseas. When Illinois enacted H.B. 1711, the statute aimed squarely at closing Cavel International's plant, which was by then the only facility in the United States for processing horsemeat for human consumption.

From the moment Illinois enacted H.B. 1711, a central issue in this litigation challenging its constitutionality has been the state's justification for the statute. In enjoining enforcement of H.B. 1711 pending appeal, the Seventh Circuit recognized that "[t]he object of the statute is totally obscure." *Cavel Int'l, Inc.* v. *Madigan*, 500 F.3d 544, 546 (7th Cir. 2007); Pet. App. 45a. Whatever that object is, the Seventh Circuit believed that it is "remote from the vital interests of most Illinois residents" and that "the statute does not seem to be intended to protect horses." *Id.*; Pet. App. 45a, 46a.

Nonetheless, the Seventh Circuit, in an opinion by Judge Posner, felt constrained to uphold the constitutionality of the statute. *Cavel Int'l, Inc.* v. *Madigan*, 500 F.3d 551, 558 (7th Cir. 2007) ("[W]e are not entirely happy about *having* to uphold the Illinois statute.") (emphasis added); Pet. App. 14a. It did so even as it recognized that the statute "burdens foreign commerce" and is supported only "tenuously" with a legitimate state interest. *Id.* at 557, 558; Pet. App. 13a, 14a. Indeed, that tenuous interest was advanced for the first time by the court itself at oral argument without any factual basis in the record. In reaching its judgment, the court below questioned the validity of this Court's longstanding precedents under the

Foreign Commerce Clause, deepened noted conflicts among the circuits, and created a split of authority with the First Circuit.

This Court should grant review to provide guidance and clarity on these issues of national (and international) importance under the Foreign Commerce Clause, on which the lower courts disagree and reach inconsistent results. Because this case directly presents these issues, which can be expected to recur with increasing frequency, it is an ideal vehicle for this Court to define the province of the states to regulate and prohibit the otherwise lawful conduct of businesses engaged in our nation's foreign commerce.

A. Factual Background

Since 1987, Cavel International operated a slaughterhouse in DeKalb, Illinois subject to regulatory approval and oversight by the United States Department of Agriculture ("USDA"). At its DeKalb plant, Cavel International processed horsemeat for human consumption solely for export overseas to nations such as Belgium, France, Switzerland, Italy, Germany, and the Netherlands. None of the horsemeat Cavel International processed for human consumption was consumed in Illinois or in the United States. When H.B. 1711 was enacted, Cavel International had more than sixty employees, including the individual plaintiffs, and generated approximately $20 million in annual revenues.

Cavel International's DeKalb plant was designed and built specifically for the export and sale of horsemeat for human consumption. It has never slaughtered animals other than horses. Less than one

percent of Cavel International's horsemeat was sold for purposes other than human consumption, such as for use as animal food. Likewise, Cavel International's sales of various parts of horse carcasses for research, medical and pharmaceutical use, and educational purposes accounted for less than one-percent of its business. Other aspects of Cavel International's facilities and operations are not large enough to allow the company to operate economically if it may not sell horsemeat for human consumption abroad.

No health or safety issues are raised by the slaughter, sale, or consumption of horsemeat because Cavel International is subject to the same regulations applicable to other types of meat sold for human consumption in the United States, such as beef, pork, and lamb. Cavel International slaughters horses using the humane methods required by federal and state law. *See, e.g.*, Humane Methods of Livestock Slaughter Act, 7 U.S.C. § 1901 *et seq.*; Illinois Humane Slaughter of Livestock Act, 510 Ill. Comp. Stat. 75/1. A USDA veterinarian is on site at Cavel International at all times during operation to ensure compliance with federal laws and regulations.

Cavel International contracts with a network of buyers throughout the United States to acquire horses at auctions around the country. Most horses Cavel International purchases come from outside Illinois. Transportation of horses to Cavel International's plant is also regulated by federal law, *see, e.g.*, Commercial Transportation of Equine for Slaughter Act of 1996, 9 C.F.R. § 88.1 *et seq.*, and USDA inspectors examine horses arriving at the plant.

Cavel International's processed horsemeat is exported overseas by air and ship.

Cavel International does not operate any other plants, and its only assets are those at the DeKalb facility. Cavel International is, ultimately, owned by a Belgian national.

On February 22, 2007, H.B. 1711 was introduced in the Illinois General Assembly. Approximately one month earlier, on January 19, 2007, the Fifth Circuit reversed the judgment of the Northern District of Texas, which had declared that an obscure and arguably repealed 1945 Texas statute outlawing the possession and sale of horsemeat for human consumption was preempted by federal law and violated the interstate Commerce Clause. *See generally Empacadora de Carnes de Fresnillo, S.A. de C.V.* v. *Curry*, No. 4:02-CV-804-Y, 2005 U.S. Dist. LEXIS 18261, 2005 WL 2074884 (N.D. Tex. Aug. 25, 2005), *rev'd*, 476 F.3d 326 (5th Cir. 2007), *cert. denied*, 127 S. Ct. 2443 (2007). That litigation was brought by three slaughterhouses unrelated to Petitioner Cavel International.

The State of Illinois enacted H.B. 1711 on May 24, 2007. In signing H.B. 1711 into law, Illinois Governor Rod Blagojevich confirmed that the statute is aimed directly at closing Cavel International, mentioning the company by name, and that it seeks to influence the culinary options of foreigners. In his signing statement, Governor Blagojevich noted the role of Bo Derek in passage of the legislation and stated that "[i]t's past time to stop slaughtering horses in Illinois and sending their meat overseas." Respondent Charles Hartke, Director of the Illinois Department of

Agriculture, added that "[t]here is no domestic market for horsemeat and, therefore, no need for this practice to continue in Illinois. Meat from the slaughtered horses is being shipped overseas to places like Belgium, France and Japan."

B. Proceedings Below

On May 25, 2007, Petitioners filed suit seeking injunctive relief against enforcement of H.B. 1711 and a declaratory judgment that the legislation violates the United States Constitution. The jurisdiction of the district court was invoked under 28 U.S.C. § 1331, since Petitioners' verified complaint is a civil action arising under the Constitution, laws, or treaties of the United States. The district court granted, and subsequently extended, a temporary restraining order. Following a bench trial at which the parties presented evidence and argued the constitutionality of the statute, the district court entered judgment upholding the constitutionality of H.B. 1711.

In the district court, Respondents advanced two interests supporting H.B. 1711: (1) the regulation of food for human consumption and (2) the humane treatment of animals. *See* Pet. App. 38a. In its opinion, the district court did not discuss the former. Nonetheless, the district court's skepticism was evident in the proceedings before it: "[B]ecause all of the horse meat processed by the plaintiffs for human consumption is exported . . . the state regulates meat consumption by people outside of the United States, and I'm wondering how it's appropriate for the Illinois legislature to exercise its power for the welfare of foreign people." With regard to the latter, the district court invoked the familiar maxim that legislatures

may take incremental steps in addressing a perceived problem. *See* Pet. App. 39a. Additionally, the district court concluded on its own that "preserving and promoting public morality" supports the statute. *Id.*

Pending appeal of the district court's judgment, the Seventh Circuit enjoined enforcement of H.B. 1711 over the dissent of Chief Judge Easterbrook. After Petitioners filed and served their merits brief, the Seventh Circuit released the opinions for its earlier ruling enjoining enforcement of the statute. *See Cavel Int'l, Inc.* v. *Madigan*, 500 F.3d 544 (7th Cir. 2007); Pet. App. 43a–55a. For the majority, Judge Posner expressed skepticism that Respondents would experience irreparable harm from an injunction. Indeed, the court suggested that "it is difficult to see what harm would ensue from permanently abrogating the statute if the welfare of horses would not be affected." *Id.* at 546; Pet. App. 46a.

In that regard, the court noted that "the statute does not seem to be intended to protect horses. (The object of the statute is totally obscure.)" *Id.* at 546; Pet. App. 45a. The court reasoned that, consistent with H.B. 1711, Cavel International could continue to operate and process horsemeat for purposes other than human consumption, such as for pet food, and in any event "all that will happen is that horses will be slaughtered elsewhere to meet the demands of the European gourmets." *Id.*; *see also id.* at 548 ("[T]he Illinois statute does not forbid the killing of horses, but only the killing of them for human consumption of their meat."); Pet. App. 50a. The court concluded that

the "statute is remote from the vital interests of most Illinois residents." *Id.* at 546; Pet. App. 46a.[1]

After the Seventh Circuit released its opinions on the injunction pending appeal, Respondents filed their merits briefs. Instead of arguing the same interests in defense of H.B. 1711 as they had in the district court (regulation of food and the humane treatment of animals), Respondents maintained for the first time on appeal that H.B. 1711 promotes chemical euthanasia of horses over the captive bolt gun method used by Cavel International in compliance with federal and state law, both of which define the latter method as humane. *See* Humane Methods of Livestock Slaughter Act, 7 U.S.C. § 1902(a); Illinois Humane Care for Animals Act, 510 Ill. Comp. Stat. 75/2(6). Additionally, Respondents embraced the district court's rationale that the statute advances the state's interest in "preserving and promoting the public morality."[2]

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[1] The dissent addressed the merits of the appeal only to note the Fifth Circuit's decision in *Empacadora de Carnes de Fresnillo*, 476 F.3d 326, and the potentially different effects of various subsections of Section 5 of H.B. 1711. *Cavel Int'l*, 500 F.3d at 549–50; Pet. App. 52a–53a. The dissent also commented on this Court's "tolerant approach to even silly statutes that regulate business." *Id.* at 550 (citing *New Orleans* v. *Dukes*, 427 U.S. 297 (1976)); Pet. App. 53a.

[2] The *amici curiae* participating on the side of Respondents, the Humane Society of the United States and the Animal Welfare Institute, went even further. For the first time in the Seventh Circuit, Respondents' *amici* variously offered deterring horse theft, preventing communicable equine diseases, protecting "companion animals," and removing some "stigma" from DeKalb, Illinois as rationales for H.B. 1711. Although *amici* are precluded from "join[ing] issues not joined by the parties in

Thus postured, a key issue before the Seventh Circuit at oral argument was the question asked by Judge Rovner: "What is the state's primary justification for this statute?" Pet. App. 82a. In response, Respondents pointed to the status of horses as "companion animals" and their nature when led to slaughter. *Id.* Respondents also argued that the statute aimed at deterring horse theft. *See* Pet App. 77a. The court greeted these responses with skepticism. *See, e.g.*, Pet. App. 82a ("You don't have any evidence as to how [the slaughter is] done. You don't know anything about that. You have some completely unsupported statement about the difference between chemical euthanasia and having a bolt through your forehead."); *see also* Pet. App. 78a ("Shouldn't the state give some reasons for thinking something is rational? . . . You didn't give any reason.").

Nonetheless, the Seventh Circuit upheld the constitutionality of H.B. 1711. The court first concluded that the statute does not discriminate against foreign commerce because it applies equally to both local and foreign-owned slaughterhouses and no local company benefits from the legislation. *Cavel Int'l*, 500 F.3d at 555; Pet. App. 7a. Recognizing that Cavel International's business "has a local character but primarily foreign consequences," the court turned to the balancing required under the interstate Commerce Clause by *Pike* v. *Bruce Church, Inc.*, 397

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interest," *United States* v. *Michigan*, 940 F.2d 143, 165 (6th Cir. 1991)), a limitation enforced by the district court in this case, these *amici* nonetheless presented volumes of affidavits, documents, and other evidentiary materials not properly a part of the record in advancing these claimed interests.

U.S. 137, 142 (1970). *Id.*; Pet. App. 8a. After noting a split among the circuits, arising from this Court's decision in *General Motors Corp.* v. *Tracy*, 519 U.S. 278, 299 n.12 (1997), regarding the availability of analysis under *Pike* where state laws regulate evenhandedly, the court questioned the vitality of *Pike*. *Id.* at 556; Pet. App. 9a–10a.

Acknowledging that state laws that have no rational justification or irrationally burden property rights are invalid, the court then addressed the state's interest in the statute. *Id.*; Pet. App. 9a–11a. In identifying the justification for H.B. 1711, the court initially posited an interest Respondents did not argue below: ending an inducement to slaughter. *Id.* at 556–57; Pet. App. 10a–11a. Conceding that "the slaughter of horses will continue" to supply food to zoos notwithstanding the Illinois law, the court identified "distaste" as sufficient justification for the statute. *Id.* at 557; Pet. App. 12a The court reasoned that "even if no horses live longer as a result of the new law, a state is permitted, within reason, to express disgust" at what happens to animals after they are dead. *Id.*

Having considered the constitutionality of H.B. 1711 under the interstate Commerce Clause, the Seventh Circuit next addressed the Foreign Commerce Clause. *Id.* at 557–58; Pet. App. 13a. In doing so, the court acknowledged that "the Illinois statute burdens foreign commerce." *Id.*

Questioning the vitality of this Court's decision in *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434 (1979), the court dismissed the Belgian Foreign Minister's letter of protest to Illinois Governor

Blagojevich. *Id.* at 557–58; Pet. App. 14a. In this respect, the court focused on the effect of H.B. 1711 on the price of horsemeat in Europe. *Id.* at 558; Pet. App. 14a. Finally, the Seventh Circuit concluded that H.B. 1711 is only "tenuously" supported by a legitimate state interest and remarked that it is "not entirely happy about having to uphold the Illinois statute." *Id.*[3]

After issuing its opinion, the Seventh Circuit dissolved the injunction it had previously granted. Cavel International has not operated since.

REASONS FOR GRANTING THE PETITION

The decision below is a product of this Court's limited treatment of the Foreign Commerce Clause. Owing to disagreements among the lower courts that have developed without clear guidance from this Court, the Seventh Circuit made several erroneous pronouncements on substantive and procedural questions of national and international importance under the Foreign Commerce Clause. These include the standard for determining when state laws that burden foreign commerce violate the Constitution, how courts are to make such determinations, and whether the federal interest in uniformity in the conduct of our nation's foreign affairs and international trade alter traditional Commerce Clause analysis.

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[3] The Seventh Circuit also held that the express preemption clause of the federal Meat Inspection Act, 21 U.S.C. § 678, which preempts state laws regulating ingredient requirements and the premises, facilities, and operations of slaughterhouses, does not preempt H.B. 1711. *Id.* at 553–54; Pet. App. 4a–6a.

In addressing such issues, the position taken by the Seventh Circuit has created a conflict with the First Circuit's authoritative decision in *National Foreign Trade Council* v. *Natsios*, 181 F.3d 38, 67 (1st Cir. 1999), *aff'd sub nom. Crosby* v. *National Foreign Trade Council*, 530 U.S. 363 (2000). As a result of the judgment below, the First and Seventh Circuits disagree on, among other things, the meaning of discrimination under the Foreign Commerce Clause and the weight of any *amicus* filings by the federal government or foreign nations. Indeed, the ruling below notes several splits among the circuits and questions the vitality of this Court's leading Commerce Clause precedents.

Moreover, the decision below has created new state interests that will justify burdens on commerce, and foreign commerce in particular. H.B. 1711 has nothing to do with any of the few local interests demonstrated in the record or advanced by Respondents below. Whether in such circumstances the court may substitute its own post hoc rationalization is of broad consequence. Whatever the answer, the Illinois statute is an arbitrary and capricious measure that reaches outside Illinois and the United States to interfere with a well established practice, which happens to occur only in foreign countries.

The Seventh Circuit's judgment demonstrates a compelling need for this Court's guidance on and review of the questions presented.

I. This Court Should Intervene to Resolve the Multiple Splits of Authority on Issues of National (and International) Importance under the Foreign Commerce Clause.

This Court last addressed the Foreign Commerce Clause some fourteen years ago in *Barclays Bank PLC* v. *Franchise Tax Board of California*, 512 U.S. 298 (1994). That case arose in the context of a challenge to the effect of California's corporate franchise tax on foreign-based multinational entities. Indeed, the overwhelming majority of this Court's Foreign Commerce Clause decisions have come in the area of state taxation. Without a well developed body of authoritative pronouncements from this Court on which to draw when reviewing state statutes that directly regulate foreign commerce, the lower courts have struggled to develop and apply a clear and consistent analytical framework.

A. Courts and Commentators Recognize the Need for This Court's Guidance.

The lower courts disagree on such basic questions as the appropriate level of scrutiny to which laws challenged under the Foreign Commerce Clause are subject. Some courts hold that state regulations affecting foreign commerce are invalid "if they (1) create a substantial risk of conflicts with foreign governments; or (2) undermine the ability of the federal government to speak with one voice in regulating commercial affairs with foreign states." *Piazza's Seafood World, LLC* v. *Odom*, 448 F.3d 744, 750 (5th Cir. 2006) (quotations omitted). Others apply "a more rigorous and searching scrutiny," *Norfolk S. Corp.* v. *Oberly*, 822 F.2d 388, 404 (3d Cir. 1987)

(quotation omitted), which some courts interpret as a "super strict" scrutiny for laws that discriminate against foreign commerce, *see, e.g.*, *National Solid Wastes Mgmt. Ass'n* v. *Charter County of Wayne*, 303 F. Supp. 2d 835, 849 (E.D. Mich. 2004) ("[T]he Amendments do not withstand the Court's . . . heightened level of strict scrutiny under the foreign Commerce Clause."). Still others conclude that inquiry under the Foreign Commerce Clause is no different than under the interstate Commerce Clause. *See, e.g.*, *K.S.B. Tech. Sales* v. *North Jersey Dist. Water Supply Comm'n*, 75 N.J. 272, 299–300, 381 A.2d 774, 788 (1977).

Indeed, acknowledging such fundamental disagreements in the case law, courts and commentators alike have recognized the need for this Court's guidance on analysis under the Foreign Commerce Clause. *See, e.g.*, *United States* v. *Clark*, 435 F.3d 1100, 1103 (9th Cir. 2006) (noting that adapting interstate Commerce Clause analysis to foreign commerce "can feel like jamming a square peg into a round hole"); *Antilles Cement Corp.* v. *Acevedo Vila*, 408 F.3d 41, 46 (1st Cir. 2005) (acknowledging that analysis under the Foreign Commerce Clause "is relatively undeveloped in the Supreme Court's case law"); *Hartford Enters., Inc.* v. *Coty*, ___ F. Supp. 2d ___, ___, No. 07-112-P-H, 2008 U.S. Dist. LEXIS 532, at *28, 2008 WL 54291, at *7 (D. Me. Jan. 3, 2008) ("The Foreign Commerce Clause is a complex and largely undeveloped area of constitutional law.") (quotations omitted); *see also, e.g.*, Kenneth M. Casebeer, *The Power to Regulate "Commerce with Foreign Nations" in a Global Economy and the Future of American Democracy: An Essay*, 56 U. Miami L.

Rev. 25, 34 (2001) ("The Foreign Commerce Clause by itself has had little doctrinal elaboration[.]").

The decision below evidences the state of the law in the lower courts, which traces to this Court's limited consideration of the Foreign Commerce Clause. Notwithstanding this Court's rejection of the argument that Commerce Clause analysis is the same for both interstate and foreign commerce, *see, e.g.*, *Japan Line*, 441 U.S. at 445, the lower courts have struggled to apply this Court's more developed decisions under the interstate Commerce Clause to cases where state laws affect foreign commerce. As a result, the uncertainty in the lower courts over the Foreign Commerce Clause originates in their attempts to apply this Court's jurisprudence under the interstate Commerce Clause to Foreign Commerce Clause cases.

For example, this Court has long recognized that "discrimination" under the Commerce Clause takes many forms and does not depend solely on disparate treatment between in-state and out-of-state interests. *See, e.g.*, *C & A Carbone, Inc.* v. *Town of Clarkstown, N.Y.*, 511 U.S. 383, 391 (1994) ("The ordinance is no less discriminatory because in-state or in-town processors are also covered by the prohibition."); *Dean Milk Co.* v. *Madison*, 340 U.S. 349, 354 n.4 (1951) ("It is immaterial that Wisconsin milk from outside the Madison area is subjected to the same proscription as that moving in interstate commerce."); *Brimmer* v. *Rebman*, 138 U.S. 78, 83 (1891) ("[A] burden imposed by a State upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the States, including the people of the State enacting such

statute.") (quoting *Minnesota* v. *Barber*, 136 U.S. 313, 326 (1890)).

Nor has this Court limited its notion of discrimination solely to economic protectionism. *See, e.g., New Energy Co.* v. *Limbach*, 486 U.S. 269, 276 (1988) ("[W]here discrimination is patent, as it is here, neither a widespread advantage to in-state interests nor a widespread disadvantage to out-of-state competitors need be shown."); *Kraft Gen. Foods, Inc.* v. *Iowa Dep't of Revenue & Fin.*, 505 U.S. 71, 79 (1992) ("We are not persuaded . . . that such favoritism is an essential element of a violation of the Foreign Commerce Clause. . . . As the absence of local benefit does not eliminate the international implications of the discrimination, it cannot exempt such discrimination from Commerce Clause prohibitions.").

Further, this Court has long understood that even statutes purportedly neutral on their face may discriminate in practical effect. *See, e.g., Hughes* v. *Oklahoma*, 441 U.S. 322, 336 (1979) (stating that a state statute can discriminate "either on its face or in practical effect"); *see also Brown-Forman Distillers Corp.* v. *New York State Liquor Auth.*, 476 U.S. 573, 583 (1986); *Hunt* v. *Washington State Apple Adver. Comm'n*, 432 U.S. 333, 352 (1977); *Fort Gratiot Sanitary Landfill, Inc.* v. *Michigan Dep't of Natural Res.*, 504 U.S. 353, 361–63 (1992). Yet this Court has, on occasion, particularly in the flow control context, articulated narrower notions of what constitutes discrimination under the Commerce Clause. *See, e.g., Oregon Waste Sys., Inc.* v. *Department of Envtl. Quality*, 511 U.S. 93, 99 (1994) ("'[D]iscrimination' simply means differential treatment of in-state and

out-of-state economic interests that benefits the former and burdens the latter."); *see also United Haulers Ass'n* v. *Oneida-Herkimer Solid Waste Mgmt. Auth.*, 127 S. Ct. 1786, 1793 (2007). "Indeed, the cases in this area seem quite inconsistent." Erwin Chemerinsky, *Constitutional Law: Principles & Policies* § 5.3, at 415 (2d ed. 2002).

B. The Ruling Below Reflects the Need for This Court's Guidance and Conflicts with the Positions of Other Circuits.

The Seventh Circuit's decision reflects the state of the law in the lower courts. Further, it is a product of tensions in this Court's Commerce Clause jurisprudence of the sort shown above. The Seventh Circuit concluded that H.B. 1711 does not discriminate against interstate or foreign commerce because it viewed the statute as applying evenhandedly to in-state and out-of-state interests without a protectionist motive. *Cavel Int'l*, 500 F.3d at 555; Pet. App. 7a. Even so, the court below did not feel constrained by the limited concept of discrimination it articulated, suggesting that "hostility to foreigners" could invalidate the statute. *Cavel Int'l*, 500 F.3d at 558; Pet. App. 14a.[4]

But the Illinois statute is indistinguishable from laws this Court has struck down as facially discriminatory. For example, in *Hughes* v. *Oklahoma*,

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[4] Contrary to the Seventh Circuit's belief, the Governor's signing statement demonstrates more than just "indifference" to foreigners. *Cavel Int'l*, 500 F.3d at 558; Pet. App. 14a. The Governor's pronouncement that "[i]t's past time to stop slaughtering horses in Illinois *and sending their meat overseas*" reflects discrimination against foreign interests. *See* Pet. App. 72a–73a (emphasis added).

441 U.S. 322 (1979), an Oklahoma law provided that "[n]o person may transport or ship minnows for sale outside the state which were seined or procured within the waters of this state . . . ." *Id.* at 323 n.1; *cf.* H.B. 1711 § 5. This prohibition applies evenhandedly to Oklahoma residents and non-residents alike. *See Hughes*, 441 U.S. at 344 (Rehnquist, J., dissenting) ("This is not a case where a State's regulation permits residents to export naturally seined minnows but prohibits nonresidents from so doing."). Nonetheless, this Court held that the Oklahoma statute "on its face discriminates against interstate commerce" by blocking the flow of commerce at the state's borders. *Id.* at 336–37.

The Illinois law at issue here discriminates against commerce no less. H.B. 1711 is a direct prohibition by the State of Illinois against foreign commerce in a product that Cavel International lawfully processed and sold abroad for twenty years. On its face, the Illinois statute prohibits the "export" of horsemeat for human consumption. Pet. App. 56a. But H.B. 1711 goes one step further. Cavel International shipped all of its horsemeat for human consumption abroad and supplied all such commerce from the United States when Illinois enacted the law. Therefore, the plain effect of H.B. 1711 demonstrated in the record was to restrain the foreign commerce of the United States by forcing Petitioner Cavel International from its otherwise lawful business.

By concluding otherwise, the judgment below has created a split with the First Circuit's decision in *National Foreign Trade Council* v. *Natsios*, 181 F.3d 38 (1st Cir. 1999), *aff'd sub nom. Crosby* v. *National Foreign Trade Council*, 530 U.S. 363 (2000). There,

the court invalidated under the Foreign Commerce Clause a Massachusetts law restricting the commonwealth and its agencies from purchasing goods or services from companies that did business with Burma. In so holding, the court specifically rejected the formulation of discrimination adopted by the Seventh Circuit here. *Id.* at 67 ("Massachusetts contends . . . that a law must distinguish between foreign and domestic producers in order to be held facially invalid. That is not the test."). Rather, the law ran afoul of the Constitution as "a direct attempt to regulate the flow of foreign commerce," *id.* at 68, as is H.B. 1711. This Court affirmed the judgment in *Natsios* on preemption grounds, but the First Circuit's Foreign Commerce Clause analysis remains one of the leading authorities in the field, *see, e.g.*, *National Solid Wastes Mgmt. Ass'n* v. *Granholm*, 344 F. Supp. 2d 559, 565–66 (E.D. Mich. 2004); *Emerson Elec. Co.* v. *Tracy*, 90 Ohio St. 3d 157, 159, 735 N.E.2d 445, 447 (2000) – one that now stands in conflict with the decision below.

This conflict between the judgment below and *Natsios* is but one issue on which the Seventh Circuit's ruling stands in tension with the law of other circuits.[5] Indeed, the court below noted a split among the circuits on the availability of *Pike* analysis absent a showing of discrimination. *Cavel Int'l*, 500 F.3d at 555–56; Pet. App. 8a–9a. The court noted that several

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[5] In *Empacadora de Carnes de Fresnillo*, 476 F.3d at 335, the Fifth Circuit expressly declined to address the Foreign Commerce Clause. *See also* Pet. App. 30a ("The 'import and export' reference in *Empacadora De Carnes De Fresnillo* was used to explain that the court was not going to address the Foreign Commerce Clause.").

circuits require a showing of "at least incidental effects on interstate commerce" before *Pike* analysis is available. *Id.* (internal quotations omitted) (quoting *National Paint & Coatings Ass'n* v. *City of Chicago*, 45 F.3d 1124, 1131 (7th Cir. 1995); *Grant's Dairy-Maine, LLC* v. *Commissioner of Maine Dep't of Agric., Food & Rural Res.*, 232 F.3d 8, 18 (1st Cir. 2000); *Automated Salvage Transp., Inc.* v. *Wheelabrator Envtl. Sys., Inc.*, 155 F.3d 59, 75 (2d Cir. 1998); *Instructional Sys., Inc.* v. *Computer Curriculum Corp.*, 35 F.3d 813, 825-26 (3d Cir. 1994)). In contrast, the Seventh Circuit identified other circuits that, relying on this Court's decision in *General Motors Corp.* v. *Tracy*, 519 U.S. 278, 299 n.12 (1997), apply *Pike* to statutes that regulate evenhandedly. *Cavel Int'l*, 500 F.3d at 556; Pet. App. 9a (citing *Eastern Ky. Res.* v. *Fiscal Court*, 127 F.3d 532, 544-45 (6th Cir. 1997); *American Target Adver., Inc.* v. *Giani*, 199 F.3d 1241, 1254 (10th Cir. 2000)).

Of even greater significance, the Seventh Circuit's opinion questions the vitality of several of this Court's long-standing authoritative precedents. Notwithstanding this Court's affirmation of *Pike* last term in *United Haulers*, 127 S. Ct. at 1797, the court below expressed doubt that *Pike* has a place in Commerce Clause analysis. *Cavel Int'l*, 500 F.3d at 556 ("That makes us wonder just what work *Pike* does, but that is not an issue we need pursue."); Pet. App. 10a. Further, the court questioned whether *Japan Line*, this Court's seminal Foreign Commerce Clause case in modern constitutional law, survives *Barclays Bank*, *see Cavel Int'l*, 500 F.3d at 558; Pet. App. 14a – another argument the First Circuit expressly rejected in *Natsios*, 181 F.3d at 68 ("Massachusetts misreads

Barclays. Rather than dismantling the one voice test, *Barclays* applied this test."). Because *Japan Line's* "one voice" inquiry is substantially the same as this Court's analysis under the Import-Export Clause, *see, e.g.*, *Japan Line*, 441 U.S. at 449 & n.14 ("The policies animating the Import-Export Clause and the Commerce Clause are much the same.") (citing *Michelin Tire Corp.* v. *Wages*, 423 U.S. 276, 285–86 (1976)), the Seventh Circuit's decision is of consequence in other areas of constitutional law affecting international commerce and our nation's foreign affairs.

This Court's intervention is necessary to provide guidance and bring clarity to analysis under the Foreign Commerce Clause and to promote uniformity in the judiciary's Foreign Commerce Clause cases.

II. The Lower Court's Creation of New Interests that Will Justify Burdens on Commerce and Its Fundamental Restructuring of Analysis under the Foreign Commerce Clause Underscore the Need for This Court's Guidance.

Several erroneous pronouncements on issues of national and international consequence in the judgment below demonstrate the need for this Court to elucidate the proper analysis of when and under what standards a state law may burden foreign commerce more generally.

First, as this Court has recognized, "[i]t is crucial to the efficient execution of the Nation's foreign policy that the Federal Government speak with one voice when regulating commercial relations with foreign governments." *South-Central Timber Dev., Inc.* v.

Wunnicke, 467 U.S. 82, 100 (1984) (quotations omitted). In this regard, the Foreign Commerce Clause recognizes that state laws affecting foreign commerce may create problems, such as the potential for political or trade retaliation by other nations, that concern the United States as a whole. *See, e.g., Kraft Gen. Foods*, 505 U.S. at 79 (citing *Japan Line*, 441 U.S. at 450).

The court below concluded that H.B. 1711 "burdens foreign commerce." *Cavel Int'l*, 500 F.3d at 557; Pet. App. 13a. Moreover, the Seventh Circuit acknowledged the risk that state laws such as H.B. 1711 can negatively affect the foreign affairs of the United States. *See Cavel Int'l*, 500 F.3d at 558; Pet. App. 13a. Yet the court questioned the vitality of *Japan Line* and simply dismissed such risks in this case, notwithstanding Belgium's letter of protest to Illinois Governor Blagojevich. *See Cavel Int'l*, 500 F.3d at 558; Pet. App. 14a.

In doing so, the Seventh Circuit adopted a requirement for the quantification of a burden to foreign commerce – a requirement this Court has not sanctioned under either the interstate or Foreign Commerce Clause. Further, the court fundamentally restructured Foreign Commerce Clause analysis by looking to the effect of Cavel International's closing "on the price of horse meat *in Europe*." *Cavel Int'l*, 500 F.3d at 558 (emphasis added); Pet. App. 14a. But the Foreign Commerce Clause only protects the foreign commerce of the United States; it does not protect or regulate global markets.

Concluding that H.B. 1711 only slightly burdens foreign commerce, the court below disregarded the

congressional finding that meat regulated under the Meat Inspection Act, specifically including horsemeat, is "either in interstate or foreign commerce or substantially affect[s] such commerce." 21 U.S.C. § 602. Even if a state law that halts all foreign commerce of the United States in a particular product somehow does not substantially burden commerce, this Court has recognized that slight burdens that might otherwise be tolerable under the interstate Commerce Clause fail under the Foreign Commerce Clause. *See, e.g.*, *Japan Line*, 441 U.S. at 456 ("Even a slight overlapping of tax – a problem that might be deemed *de minimis* in a domestic context – assumes importance when sensitive matters of foreign relations and national sovereignty are concerned."); *see also* 1 Laurence H. Tribe, *American Constitutional Law* § 6–24, at 1152 (3d ed. 2000) ("If state action touching foreign commerce is to be allowed, it must be shown not to affect national concerns to any appreciable degree, a far more difficult task than in the case of interstate commerce.").

Finally, the Seventh Circuit suggests that an *amicus* brief from the State Department, or a foreign government in addition to Belgium's action, may have affected its conclusion.[6] *See Cavel Int'l*, 500 F.3d at

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[6] The court disregarded the position of the federal government in *Humane Society of the United States* v. *Johanns*, No. 1:06-cv-002065 (D.D.C.), *appeal docketed*, No. 07-5120 (D.C. Cir.), which involves a challenge to certain USDA regulations relating to ante-mortem inspection at horse slaughterhouses. In the district court in that case, in which Petitioner Cavel International intervened, the United States joined in seeking a stay of an adverse judgment to allow Cavel International to continue operating pending appeal. The D.C. Circuit granted the stay. *See* No. 07-5120, 2007 U.S. App. LEXIS

558; Pet. App. 14a. On this issue, this Court's decisions stand in tension with one another, both as to the weight of and necessity for such filings and as to the institutional competence of the judiciary to determine the constitutionality of state laws under the Foreign Commerce Clause. *Compare, e.g., Container Corp. of Am.* v. *Franchise Tax Bd.*, 463 U.S. 159, 195–96 (1983) ("The lack of such a submission is by no means dispositive."), *with, e.g., Barclays Bank*, 512 U.S. at 330 (recognizing that "Executive Branch communications that express federal policy but lack the force of law cannot render unconstitutional" an otherwise valid state law).

For these reasons, the lower courts would benefit from further direction from this Court on the level of scrutiny and the circumstances under which "the special need for federal uniformity" in "the unique context of foreign commerce" will apply. *Wardair Canada Inc.* v. *Florida Dep't of Revenue*, 477 U.S. 1, 8 (1986).

Second, "the extent of the burden [on commerce] that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." *Pike*, 397 U.S. at 142. The court below posited ending an inducement to slaughter as a state interest sufficient to justify H.B. 1711's burden on foreign commerce. *See Cavel Int'l*, 500 F.3d at 556–57; Pet. App. 10a–11a. Respondents did not argue

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10785 (D.C. Cir. May 1, 2007). The position of the United States in that litigation speaks to the federal interests promoted by the continuation of the commerce in which Cavel International had engaged prior to H.B. 1711's enactment.

such an "inducement" interest, which finds no support in the record. Indeed, this rationale first surfaced at oral argument when raised by the court. *See* Pet. App. 63a.

This Court previously reserved the question whether a statement by counsel for a state defending a statute's constitutionality "suffice[s] to inform this Court of the legislature's objectives, or whether the Court must determine if the litigant simply is selecting a convenient, but false, post hoc rationalization." *Craig* v. *Boren*, 429 U.S. 190, 199 n.7 (1976). This Court has also recognized the impropriety of such post hoc rationalizations in Commerce Clause cases. *See Hughes* 441 U.S. at 338 n.20 ("The late appearance of this argument and the total absence of any record support for the questionable factual assumptions that underlie it give it the flavor of a *post hoc* rationalization.").

Because the court itself, rather than a litigant, advanced the post hoc "inducement" rationale, this case goes a step beyond the question reserved in *Craig*. Indeed, even as the court created this new interest, Judge Posner recognized that such unsupported speculation does not suffice under even deferential rational basis review:

> You're just – this is just a tissue of speculation because your conception of rational basis is: all you have to do is conjecture. You don't have any duty to – I don't mean to present trial type evidence – but, you know, to cite something which would say: yes, there's horse theft; yes, in the auction, Cavel's

> actually competing against people who would have this horse for riding and take care of it and so on. There well may be that sort of material, but you haven't looked for it.

Pet. App. 80a. While criticizing the state for failing to offer legitimate defenses for H.B. 1711 supported by the record, the court tellingly points to nothing in the record supporting its inducement rationale. No such support exists because the Illinois statute aims directly at closing Cavel International's otherwise viable business to satisfy the moral sensibilities of those offended by the culinary practices of foreigners – or, as Judge Posner put it at oral argument: "They rationally believe Bo Derek wants to save a few horses. That's what they seem to believe." Pet. App. 82a.

Even if it may properly be considered, the court's inducement rationale begs the question of what state interests will justify a burden on commerce, particularly the burden of a state law that halts all foreign commerce from the United States in a particular product. On that score, whether the Seventh Circuit's judgment ultimately rests on inducement or disgust, neither suffices. The latter is the district court's "preserving and promoting public morality" under a different guise. Such a justification misapprehends the traditional concept of "morals legislation" and offers no principled limitation since every statute, by definition, represents the moral judgment of the governing majority. Inducement, aside from its unsupported novelty, mistakes longevity for quality of life – particularly since owners who voluntarily sell their horses to Cavel International for nominal sums may not prove willing

to spend the larger amounts required for care, resulting in more cases of neglect or other abuse. *See* Pet. App. 79a; *see also* Catrin Einhorn, *Horses Spared in U.S. Face Death Across the Border*, N.Y. Times, Jan. 11, 2008, at A9 ("This is an example of well-intentioned but very bad unintended consequences.") (quoting Dr. Temple Grandin, Professor of Animal Science, Colorado State University); Paulo Prada, *Leaner Pastures: As Horses Multiply, Neglect Cases Rise*, Wall St. J., Jan. 7, 2008, at A1.

Indeed, the court below conceded that these interests only "tenuously" support H.B. 1711. *Cavel Int'l*, 500 F.3d at 558; Pet. App. 14a.[7] Along with the concession that horses will not live longer as a result of the Illinois law, H.B. 1711 stands as a state law that is all burden and no benefit. Such laws do not withstand even rational basis review and are nothing more than an arbitrary exercise of state power that violates the Constitution. *See, e.g.*, *City of Cleburne* v. *Cleburne Living Ctr., Inc.*, 473 U.S. 432, 448 (1985) (invalidating local ordinance because "the record does not reveal any rational basis" for the law); *cf. United States Dep't of Agric.* v. *Moreno*, 413 U.S. 528, 534 (1973) ("[A] bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.").

In sum, the judgment below calls out for this Court's intervention on several important substantive and procedural questions of federal constitutional law.

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[7] The Seventh Circuit did not consider, as it must, whether the state can achieve its interest in H.B. 1711, whatever it may be, through means with less impact on commerce. *See, e.g.*, *Hughes*, 441 U.S. at 336; *Pike*, 397 U.S. at 142.

Substantively, the Seventh Circuit created new interests to justify state law burdens on commerce and fundamentally restructured analysis under the Foreign Commerce Clause. Procedurally, the court substituted its own post hoc rationalization for the Illinois statute for any in the record or argued by the state. These and other errors in the judgment below demonstrate the need for this Court's guidance and for this Court to determine whether interests such as those advanced below will support state laws burdening commerce.

III. This Court Should Speak to the Questions Presented, Which Are Ripe for Review.

This case is an ideal vehicle for resolving the tensions in the Foreign Commerce Clause case law of the lower courts and for affirming the vitality of this Court's long-standing decisions questioned by the ruling below, particularly since states and local governments can be expected to enact legislation of the sort at issue here with increasing frequency.

First, the facts in this case are clear and undisputed. Unlike other foreign commerce cases that have come before this Court, this case directly presents questions under the Foreign Commerce Clause unencumbered by parallel claims implicating the market participant doctrine, the foreign affairs power, or other constitutional provisions. Therefore, this Court can speak in an area in which it has spoken only infrequently, and even less often outside the context of state taxation.

Moreover, the issues implicated by this case are ripe for this Court's consideration. Indeed, enactment of H.B. 1711 itself demonstrates the compelling need

for this Court to speak to the questions presented. Only after the Fifth Circuit's ruling in *Empacadora de Carnes de Fresnillo*, 476 F.3d 326, was H.B. 1711 introduced and Illinois emboldened to enact its law against horse slaughter.

The Seventh Circuit's ruling, particularly its invocation of novel governmental interests, is an invitation to the states and the nation's myriad political subdivisions to experiment with additional regulations targeting businesses and burdening commerce in pursuit of similarly "tenuous" interests. Indeed, state and local governments are already moving to outlaw economic activity affecting foreign commerce, such as the production and sale of foie gras[8] and the use of animals in entertainment by traveling circuses and other performers,[9] and to enact similar bans on conduct that may have a more interstate character, such as certain practices used in veal farming[10] and egg production.[11] In its strained

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[8] *See, e.g.*, H.B. 867, S.B. 312, 95th Gen. Assem., Reg. Sess. (Ill. 2007); H.B. 4871, 94th Leg., Reg. Sess. (Mich. 2007); A.B. 6277, S.B. 1463, 2007–08 Leg., Reg. Sess. (N.Y. 2007).

[9] *See, e.g.*, Notice of Intent 272278, Minneapolis City Council (2007); *see also* Int. 389–2006, N.Y. City Council (2006). Such ordinances affect foreign commerce. *See* 9 C.F.R. § 1.1 (defining "exhibitor" to include various performances or exhibitions of animals affecting commerce, in turn defined to include foreign commerce).

[10] *See, e.g.*, Petition 97-0041, California Prevention of Farm Animal Cruelty Act (initiative signature deadline Feb. 28, 2008); H.B. 1522, 160th Gen. Ct., 2d Sess. (N.H. 2008); H.B. 2085, S.B. 6062, 60th Leg., 2007 Reg. Sess. (Wash. 2007).

[11] *See, e.g.*, Petition 97-0041, California Prevention of Farm Animal Cruelty Act (initiative signature deadline Feb. 28, 2008); H.B. 95, 144th Gen. Assem., Reg. Sess. (Del. 2007); H.B. 311,

efforts to identify a legitimate state interest that could uphold the statute, the court below attempts to avoid a broader "animal rights" rationale. Nonetheless, litigants like Respondents' *amici* below can reasonably be expected to cite the Seventh Circuit's ruling for such a proposition in support of these and other laws that burden foreign and interstate commerce.

Measures of this sort, which in isolation may appear to be of little consequence, collectively threaten the national uniformity that is the hallmark of the Foreign Commerce Clause. *See, e.g., Wardair Canada*, 477 U.S. at 8. In this regard, the Seventh Circuit's judgment raises the prospect of a gradual erosion of the longstanding constitutional principle that "[i]n international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power.'" *Japan Line*, 441 U.S. at 448 (quoting *Board of Trustees of Univ. of Ill.* v. *United States*, 289 U.S. 48, 59 (1933)). For these reasons, the questions presented raise issues of national and international importance of direct and immediate consequence to a broad range of businesses and the nation as a whole.

2007–08 Leg., Reg. Sess. (Vt. 2007); S.B. 6061, 60th Leg., 2007 Reg. Sess. (Wash. 2007).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 18, 2008

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 07-2658

CAVEL INTERNATIONAL, INC., *et al.*,
Plaintiffs-Appellants,

v.

LISA MADIGAN, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Western Division.
No. 07 C 50100—Frederick J. Kapala, *Judge*.

ARGUED AUGUST 16, 2007—
DECIDED SEPTEMBER 21, 2007

Before EASTERBROOK, *Chief Judge*, and POSNER and ROVNER, *Circuit Judges*.

POSNER, *Circuit Judge*. Horse meat was until recently an accepted part of the American diet—the Harvard Faculty Club served horse-meat steaks until the 1970s. No longer is horse meat eaten by Americans, Christa Weil, "We Eat Horses, Don't We?," *New York Times*, Mar. 5, 2007, p. A19, though it is eaten by people in a number of other countries, including countries in Europe; in some countries it is a delicacy. Meat from American horses is especially prized because our ample grazing land enables them to eat natural grasses, which enhances the flavor of their meat. Mary Jacoby, "Why Belgians Shoot Horses in

Texas For Dining in Europe," *Wall St.* J., Sept. 21, 2005, p. 1.

Cavel International, the plaintiff in this case, owns and operates the only facility in the United States for slaughtering horses. Until recently it was one of three such facilities, but the other two, both in Texas, stopped slaughtering horses after the Fifth Circuit upheld a Texas law similar to the Illinois law challenged in this case. *Empacadora de Carnes de Fresnillo, S.A. de C.V. v. Curry*, 476 F.3d 326, 336-37 (5th Cir. 2007).

Cavel's slaughterhouse, located in DeKalb, Illinois, near Chicago, has some sixty employees and slaughters some 40,000 to 60,000 horses a year, out of a total of about 700,000 horses that either are killed or die of natural causes in the United States annually. Cavel buys its horses for about $300 apiece from brokers who obtain them at auctions. The company has been in operation for 20 years and has some $20 million in annual revenues.

Horses are the only animals that Cavel slaughters, and it represented to us without contradiction that if it loses this case it will have to shut down. The Texas slaughterhouses were more eclectic—they slaughtered, besides horses, such sources of "atypical meat products" as bison and ostrich. But they too represented to the courts that if forbidden to slaughter horses they would have to shut down, though it appears that after a brief shutdown they reopened, adding cattle to their menu, as it were. Illinois House Bill 1711, Bill for an Act Concerning Horses, 95th General Assembly 16 (April 18, 2007) (statement of Representative Molaro).

In the United States, horses are killed in slaughterhouses only when the horses' flesh is destined for eating by human beings or (a detail to be considered later) zoo animals. The flesh of horses that is intended for pet food is obtained from the corpses hauled to rendering plants for disposal; the plants also produce glue and other products from the carcasses. (All these businesses are in terminal decline. Jeffrey McMurray, "Some Horses Left to Starve as Market for Meat Shrivels," *Chi. Tribune*, Mar. 15, 2007, p. 3.) Unlike Cavel's slaughterhouse, a rendering plant's methods of producing meat from dead horses do not have to comply with the requirements that the federal Meat Inspection Act, 21 U.S.C. § 601, prescribes for the production of meat, expressly including horse meat, §§ 601(j), (w), intended for human consumption. The Act is fully applicable to Cavel, see 21 U.S.C. § 617, even though, because there is no U.S. domestic market for horse meat as a human food, Cavel's entire output is exported to such countries as Belgium, France, and Japan. Indeed, Cavel is the subsidiary of a Belgian company.

On May 24 of this year, the Illinois Horse Meat Act, 225 ILCS 635, was amended to make it unlawful for any person in the state either "to slaughter a horse if that person knows or should know that any of the horse meat will be used for human consumption," § 635/1.5(a), or "to import into or export from this State, or to sell, buy, give away, hold, or accept any horse meat if that person knows or should know that the horse meat will be used for human consumption." § 635/1.5(b). (Prior to the amendment, the statute merely required a license to slaughter horses and imposed various inspection, labeling, and other regulatory restrictions on licensees. The prohibition has

made these provisions academic). Cavel claims that the amendment violates both the federal Meat Inspection Act and the commerce clause—the provision in Article I, section 8, of the federal Constitution that in terms merely empowers Congress to regulate interstate and foreign commerce but that has been interpreted to limit the power of states to regulate interstate and foreign commerce even in the absence of federal legislation inconsistent with the state regulation. *Willson v. Black Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245, 252 (1829) (Marshall, C.J.); *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Management Authority*, 127 S. Ct. 1786, 1792-93 (2007).

Cavel moved for a preliminary injunction against the enforcement of the amendment. The district court declined to issue it, on the ground that Cavel had failed to make a strong showing that it was likely to prevail on the merits. Cavel appealed, and we enjoined the application of the amendment to Cavel pending our decision of its appeal, 2007 WL 2239215 (7th Cir. July 18, 2007), Chief Judge Easterbook dissenting.

The challenge based on the Meat Inspection Act need detain us only briefly. Cavel points to the Act's preemption clause—"requirements within the scope of this Act with respect to premises, facilities and operations of any establishment at which inspection is provided under title I of this Act [including facilities at which horses are slaughtered, 21 U.S.C. §§ 601(d), (j)] which are in addition to, or different than those made under this Act may not be imposed by any State or Territory or the District of Columbia," § 678—and argues that it signifies Congress's decision to sweep aside any state law that would render

the federal requirements inapplicable to Cavel's slaughterhouse by forbidding horses to be slaughtered. The argument confuses a premise with a conclusion. When the Meat Inspection Act was passed (and indeed to this day), it was lawful in some states to produce horse meat for human consumption, and since the federal government has a legitimate interest in regulating the production of human food whether intended for domestic consumption or for export—exporting meat unfit for human consumption would be highly damaging to the nation's foreign commerce—it was natural to make the Act applicable to horse meat. That was not a decision that states must allow horses to be slaughtered for human consumption. The government taxes income from gambling that violates state law; that doesn't mean the state must permit the gambling to continue. *Given* that horse meat is produced for human consumption, its production must comply with the Meat Inspection Act. But if it is not produced, there is nothing, so far as horse meat is concerned, for the Act to work upon.

Of course in a literal sense a state law that shuts down any "premises, facilities and operations of any establishment at which inspection is provided" is "different" from the federal requirements for such premises, but so literal a reading is untenable. If despite its title the Meat Inspection Act were intended to forbid states to shut down slaughterhouses, it would have to set forth standards and procedures for determining whether a particular slaughterhouse or class of slaughterhouses should be shut down; and it does not. The Act is concerned with inspecting premises at which meat is produced for human consumption, see, e.g., 21 U.S.C. § 606, rather than with preserving the production of particular types of meat for people to

eat. *Empacadora de Carnes de Fresnillo, S.A. de C. V. v. Curry, supra*, 476 F.3d at 333.

The more difficult question is whether the horsemeat amendment violates the commerce clause as interpreted to prohibit state regulations that unduly interfere with the foreign commerce of the United States. Cavel fastens on subsection (b) of the Illinois amendment, which forbids the importing and exporting of horse meat for human consumption. But that provision is not addressed to Cavel; it is addressed to a middleman who having procured horse meat from Cavel tries to export it, or that imports horse meat to Illinois hoping to induce Americans to eat it. (We assume that the terms "import" and "export" refer to bringing horse meat into Illinois from another state, or shipping it to another state, as well as to importing horse meat from and exporting it to a foreign country.) The provision directed at Cavel is subsection (a), which forbids the slaughtering of horses for human consumption. If that subsection is valid, Cavel loses its case.

The clearest case of a state law that violates the commerce clause is a law that discriminates in favor of local firms. E.g., *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334 (1992); *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888 (1988); *American Trucking Ass'ns v. Scheiner*, 483 U.S. 266 (1987); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 521-22 (1935) (Cardozo, J.). Suppose a state passed a law that forbade the importation of wild baitfish. That would be a discrimination against interstate and foreign commerce. This would not make the law unconstitutional per se, because the state might be able to prove that it needed the law in order to protect "unique and fragile fisheries" from parasites

prevalent in out-of-state fisheries and that there was "no satisfactory way to inspect shipments of live baitfish" for those parasites—that is *Maine v. Taylor*, 477 U.S. 131, 141 (1986). The case turned on factual issues of a kind that a court can resolve without undue risk of error.

There is no discrimination in the present case insofar as the prohibition against slaughter is concerned. If a local firm (remember that Cavel is foreign-owned) wanted to slaughter horses, it could not do so. No local merchant or producer benefits from the ban on slaughter. Compare *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977), with *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978).

The absence of outright discrimination does not terminate inquiry into a possible violation of the commerce clause. There are situations in which states by ostensibly local regulations distort the operation of interstate markets. An example is a severance tax on a raw material, such as oil or coal, of which the state (perhaps in conjunction with other states) has a monopoly or near monopoly and which is almost entirely exported rather than consumed locally. The incidence of the tax will fall on the consumers in other states, who have no voice in the politics of the producing state, and the result may be a level of taxation and resulting price to consumers that greatly exceeds the cost of the services the state provides to producers of the raw material, and that by doing so burdens the export of the raw material to other states. Or imagine a state's imposing onerous taxes on all trucks that use its highways, knowing that almost all the truck traffic originates and terminates in other states and exploiting a locational monopoly to shift the costs of

public services unrelated to highway maintenance to suppliers and consumers in other states.

Such cases present more difficult factual issues than cases of outright discrimination. Plaintiffs have sometimes prevailed, at least if the impact on commerce is evident. E.g., *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429 (1978); *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 664 (1981); but see *South Carolina State Highway Department v. Barnwell Bros., Inc.*, 303 U.S. 177 (1938). But in the case of the severance tax the "local" character of the activity taxed, although it does not immunize the tax from scrutiny, *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 617 (1981), causes a judicial hiccup, see *id.* at 618-19, even though the incidence of the tax is not local. In this case, too, the activity restricted by the state—the slaughter of horses in Illinois—has a local character but primarily foreign consequences. There can be harmful effects on free trade among the states that do not stem from even a mild disparity in treatment—as in this case, or the highway cases that we cited earlier, where there is no discrimination in favor of a local supplier. But the plaintiff has a steep hill to climb. "Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is *clearly* excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (emphasis added); see also *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471-74 (1981).

We have expressed doubt that even this tough test is available to plaintiffs unless they show at least

"mild" discrimination against interstate commerce; *Pike* seems to require that at least "incidental" "effects on interstate commerce be shown." *National Paint & Coatings Ass'n v. City of Chicago*, 45 F.3d 1124, 1131 (7th Cir. 1995); *Grant's Dairy-Maine, LLC v. Commissioner of Maine Dep't of Agriculture, Food & Rural Resources*, 232 F.3d 8, 18 (1st Cir. 2000); *Automated Salvage Transport, Inc. v. Wheelabrator Environmental Systems, Inc.*, 155 F.3d 59, 75 (2d Cir. 1998); *Instructional Systems, Inc. v. Computer Curriculum Corp.*, 35 F.3d 813, 825-26 (3d Cir. 1994). Some cases disagree, and take "even-handedly" at face value, *Eastern Kentucky Resources v. Fiscal Court*, 127 F.3d 532, 544-45 (6th Cir. 1997); *American Target Advertising, Inc. v. Giani*, 199 F.3d 1241, 1254 (10th Cir. 2000), heartened by a footnote in *GMC v. Tracy*, 519 U.S. 278, 299 n. 12 (1997), in which the Supreme Court noted that "a small number of our [i.e., the Supreme Court's] cases have invalidated state laws under the dormant Commerce Clause that appear to have been genuinely nondiscriminatory, in the sense that they did not impose disparate treatment on similarly situated instate and out-of-state interests, where such laws undermined a compelling need for national uniformity in regulation."

There may be no real disagreement in the case law. *National Paint & Coatings Ass'n* acknowledges that even in the absence of discrimination, a burden on interstate commerce that had no rational justification would be invalid. 45 F.3d at 1131. An example is the Illinois mudguard law invalidated in *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959). The law required all trucks in the state, thus including those traveling interstate, to be equipped with curved mudguards that the district court had found not only conferred "no" safety benefits over straight ones but

actually created "hazards previously unknown." *Id.* at 525. The law impeded interstate commerce—though maybe local commerce just as much—and because it lacked a rational basis it was invalid despite the lack of proof of a disparate impact. *National Paint & Coatings Ass'n v. City of Chicago, supra*, 45 F.3d at 1131; *Norfolk Southern Corp. v. Oberly*, 822 F.2d 388, 404-05 (3d Cir. 1987).

Any law, moreover, that irrationally burdens property rights can, quite apart from the commerce clause, be challenged as a deprivation of property without due process of law. *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 540-45 (2005); *Greater Chicago Combine & Center, Inc. v. City of Chicago*, 431 F.3d 1065, 1071-72 (7th Cir. 2005). That makes us wonder just what work *Pike* does, but that is not an issue we need pursue.

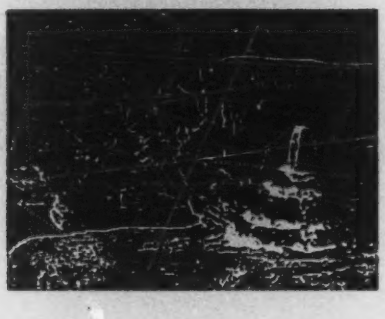
Cavel argues, in the spirit of *Bibb*, that Illinois's ban on slaughtering horses for human consumption serves no purpose at all. The horses will be killed anyway when they are too old to be useful and what difference does it make whether they are eaten by people or by cats and dogs? But the horse meat used in pet food is produced by rendering plants from carcasses rather than by the slaughter of horses, and the difference bears on the effect of the Illinois statute. Cavel pays for horses; rendering plants do not. If your horse dies, or if you have it euthanized, you must pay to have it hauled to the rendering plant, and you must also pay to have it euthanized if it didn't just die on you. So when your horse is no longer useful to you, you have a choice between selling it for slaughter and either keeping it until it dies or having it killed. The option of selling the animal for slaughter is thus financially more advan-

tageous to the owner, and this makes it likely that many horses (remember that Cavel slaughters between 40,000 and 60,000 a year) die sooner than they otherwise would because they can be killed for their meat. States have a legitimate interest in prolonging the lives of animals that their population happens to like. *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979); cf. 7 U.S.C. § 2131; *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 538 (1993); *Hoctor v. U.S. Dept. of Agriculture*, 82 F.3d 165, 168 (7th Cir. 1996). They can ban bullfights and cockfights and the abuse and neglect of animals.

Of course Illinois could do much more for horses than it does—could establish old-age pastures for them, so that they would never be killed (except by a stray cougar), or provide them with free veterinary care. But it is permitted to balance its interest in horses' welfare against the other interests of its (human) population; and it is also permitted to take one step at a time on a road toward the humane treatment of our fellow animals. E.g., *Greater Chicago Combine & Center, Inc. v. City of Chicago, supra*, 431 F.3d at 1073; cf. *Bowen v. Owens*, 476 U.S. 340, 346-47 (1986); *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 488-89 (1955); *Milner v. Apfel*, 148 F.3d 812, 818-19 (7th Cir. 1998); *Johnson v. Daley*, 339 F.3d 582, 596 (7th Cir. 2003).

There is a wrinkle in this analysis, however, though unremarked by the parties. Zoos feed a considerable amount of horse meat to their charges. Brad Haynes, "Zoos in a Pickle Over Horse Meat," Seattle Times, Aug. 14, 2007, http://seattletimes.nwsource.com/html/localnews/2003835227_horsemeat14m.html

(visited Sept. 18, 2007). For living proof, we reproduce a photograph from Haynes's article, with its caption:



> "Kwanzaa, a young South African lion at Cameron Park Zoo in Waco, Texas, celebrates his birthday with a cake made from 10 pounds of horse meat, plus whipped cream and a carrot."

As the article explains, American zoos, seeing the handwriting on the wall so far as the domestic slaughter of horses is concerned, are shifting to importing horse meat. So the slaughter of horses will continue. For all we know, Cavel may seek out a new market in America's zoos. We do not know why, with the cessation of horse slaughtering at the Texas slaughterhouses, Cavel has not done so already.

But even if no horses live longer as a result of the new law, a state is permitted, within reason, to express disgust at what people do with the dead, whether dead human beings or dead animals. There would be an uproar if restaurants in Chicago started serving cat and dog steaks, even though millions of stray cats and dogs are euthanized in animal shelters. A follower of John Stuart Mill would disapprove of a law that restricted the activities of other people (in this case not only Cavel's owners and employees but also its foreign consumers) on the basis merely of distaste, but American governments are not constrained by Mill's doctrine.

The careful reader will have noted that we have so far been discussing the legal principles governing state burdens on interstate commerce, though the Illinois statute burdens foreign commerce. Quite apart from economic consequences, an interference by a state with foreign commerce can complicate the nation's foreign relations, which are a monopoly of the federal government; states are not permitted to have their own foreign policy, their own embassies and consuls and ambassadors, and so forth. "Foreign commerce is pre-eminently a matter of national concern. 'In international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power.' *Board of Trustees v. United States*, 289 U.S. 48, 59 (1933)." *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 448-51 (1979); see also *Itel Containers Int'l Corp. v. Huddleston*, 507 U.S. 60 (1993).

Suppose Cavel were the only source of horse meat for human consumption in Europe and the law provoked European governments into remonstrating with our State Department, which in response submitted to us an amicus curiae brief denouncing the law. See *Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159, 195 (1983). True, a *Japan Line* challenge failed in *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298, 324-28 (1994), even though a number of our trading partners complained loudly about a state law that increased the costs to foreign companies of filing U.S. tax returns. But the case was special because Congress had repeatedly refused to grant the relief sought by those companies. Although Congress had not explicitly authorized the state practice, the Court ruled that Congress's lengthy consideration, followed by inaction, was an implicit au-

thorization that defeated the commerce-clause challenge.

But assuming therefore that the doctrine of *Japan Line* survives the *Barclays Bank* case, this cannot help Cavel, which did not tell the district court and has not told us what percentage of the horse meat consumed by Europeans it supplies and thus whether its being closed down is likely to have a big effect on the price of horse meat in Europe. And while it is true that the foreign minister of Belgium wrote a letter to Governor Blagojevich inquiring about the status of the bill that became the horse-meat amendment, he did not say that his government was opposing the bill. So far as we know, there was no follow-up (we have not been told whether the letter was answered and if so what it said); and we have heard nothing from any other foreign government or from the State Department.

The curtailment of foreign commerce by the amendment is slight and we are naturally reluctant to condemn a state law, supported if somewhat tenuously by a legitimate state interest, on grounds as slight as presented by Cavel. Yet we are not entirely happy about having to uphold the Illinois statute. That the company is foreign-owned and its entire output exported means that the shareholders and consumers harmed by the amendment have no influence in Illinois politics, though there is no hint in the history of the amendment of local hostility to foreigners but only of indifference to them, in the remark of the state's agriculture director that "there is no *domestic* market for horsemeat and, *therefore*, no need for this practice to continue in Illinois." Governor's Office Press Release, "Gov. Blagojevich Signs Legislation Banning the Slaughter of Horses in

Illinois for Human Consumption," May 24, 2007, www.illinois.gov/PressReleases/ShowPressRelease.cfm?SubjectID=3&RecNum=5995 (visited Sept. 5, 2007) (emphasis added).

The fact that the governor's signing statement acknowledges the role of the Hollywood actress Bo Derek, author of the book *Riding Lessons: Everything That Matters in Life I Learned From Horses* (2002), in outlawing the slaughtering of horses could be thought to inject a frivolous note into a law that forces the closing of a business that has very little to do with the people of Illinois. But this is not a basis for invalidating a nondiscriminatory statute that interferes minimally with the nation's foreign commerce and cannot be said to have no rational basis.

Although the appeal is from the denial of a preliminary injunction, the merits of Cavel's challenge to the horse-meat law have been fully briefed and argued and there are no unresolved factual issues the resolution of which in a trial would alter the result. In such a case, courts treat the appeal as if it were from a final judgment. *Mast, Foos & Co. v. Stover Mfg. Co.*, 177 U.S. 485, 494-95 (1900); *Illinois Council On Long Term Care v. Bradley*, 957 F.2d 305, 309-10 (7th Cir 1992); *Amandola v. Town of Babylon*, 251 F.3d 339, 343-44 (2d Cir. 2001) (per curiam); *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1272-74 (11th Cir. 2005). So the judgment is affirmed, the suit dismissed with prejudice, and the injunction that we granted pending appeal dissolved.

A true Copy:

Teste:

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Clerk of the United States Court of
Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

[Filed 7/5/2007]

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07 C 50100

CAVEL INTERNATIONAL, INC., *et al.*,

vs.

LISA MADIGAN, *et al.*

DOCKET ENTRY TEXT:

This matter comes before the court for a consolidated hearing on injunctive relief pursuant to Rule 65(a)(2) of the Federal Rules of Civil Procedure and for a declaratory judgment. Because plaintiffs have failed to establish any constitutional infirmity in P.A. 95-0002, the court grants defendants' motion for judgment as a matter of law against plaintiffs pursuant to Rule 52(c) of the Federal Rules of Civil Procedure.

/s/ Frederick J. Kapala
FREDERICK J. KAPALA

[For further details see text below.]

STATEMENT

Plaintiffs, Cavel International, Inc. (Cavel), James D. Tucker, Randy Beasley, Angela Fabris, Ruben Gonzalez, Brad D. Melville, Amparo Milan, Paul Milan, Raul Escutia Milan, Roberto Resendez, Ron Warner, and Isaac Zamora, are operators and em-

ployees of a plant in DeKalb, Illinois, which processes horsemeat for human consumption and exports the meat exclusively to customers living abroad. Plaintiffs have filed suit challenging the constitutionality of the newly effective P.A. 95-0002 (codified as section 1.5 of the Illinois Horse Meat Act (225 ILCS 635/1.5)) which criminalizes, among other things, the slaughter of horses with knowledge that the meat will be used for human consumption.

Plaintiffs' suit seeks a declaration that P.A. 95-0002 is unconstitutional, as well as preliminary and permanent orders enjoining defendants, Illinois Attorney General Lisa Madigan, DeKalb County State's Attorney Ron Matekaitis, Governor Rod Blagojevich[1], and Director of the Illinois Department of Agriculture, Charles A. Hartke, from enforcing the statute. Plaintiffs' complaint contains eight counts alleging that P.A. 95-0002 (1) violates the dormant foreign and interstate commerce clauses; (2) is preempted by federal law; (3) is preempted by treaties and trade agreements; (4) violates Fourteenth Amendment due process; (5) is an unconstitutional bill of attainder; (6) effects an unconstitutional taking under the Fifth Amendment; (7) is an unconstitutional exercise of Illinois' police power; and (8) constitutes special legislation prohibited by the Illinois Constitution. Plaintiffs voluntarily dismissed count VIII of the complaint prior to the hearing. The court grants defendants' motion for judgment as a matter of law against plaintiffs pursuant to Rule 52(c), finding that plaintiffs have not established any constitutional infirmity in P.A. 95-0002.

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[1] Plaintiffs have dismissed their claims against Governor Blagojevich and he is no longer a defendant in this lawsuit.

I. BACKGROUND

On May 24, 2007, P.A. 95-0002 became effective. Section 5 of P.A. 95-0002 amends the Illinois Horse Meat Act (225 ILCS 635/1 *et seq.*) by adding § 1.5 which provides in pertinent part:

> "(a) Notwithstanding any other provision of law, it is unlawful for any person to slaughter a horse if that person knows or should know that any of the horse meat will be used for human consumption.
>
> (b) Notwithstanding any other provision of law, it is unlawful for any person to possess, to import into or export from this State, or to sell, buy, give away, hold, or accept any horse meat if that person knows or should know that the horse meat will be used for human consumption.
>
> (c) Any person who knowingly violates any of the provisions of this Section is guilty of a Class C misdemeanor." P.A. 95-0002, § 5, effective May 24, 2007 (now codified as 225 ILCS 635/1.5).

On May 25, 2007, plaintiffs filed this action challenging P.A. 95-0002 and requesting a temporary, preliminary, and permanent order enjoining defendants from enforcing P.A. 95-0002 against them. This court entered a temporary restraining order on June 1, 2007, effective until June 14, 2007, restraining and enjoining defendants from prosecuting plaintiffs for violations of P.A. 95-0002. Counsel for the parties have agreed that no criminal charges for violation of P.A. 95-0002 have been filed against any plaintiff and therefore the principles of abstention developed in *Younger v. Harris*, 401 U.S. 37, 27 L. Ed. 2d 669, 91 S. Ct. 746 (1971), do not apply in this case. On June 7, 2007, this court denied a motion to intervene by

the Humane Society of the United States (HSUS). The court has granted leave to the HSUS, the Horsemen's Council of Illinois, and the Animal Welfare Institute to file *amicus curiae* briefs. On June 14, 2007, a consolidated hearing on the application for preliminary hearing and trial of the action on the merits was held pursuant to Rule 65(a)(2).

Plaintiffs called James D. Tucker, the general manager of Cavel. Tucker testified that Cavel's De Kalb, Illinois plant has been in business since 1987 and is the only plant in the United States that slaughters horses for human consumption. Tucker described Cavel's plant as a slaughterhouse and meat packing operation that produces horse meat for export as food. Tucker explained that Cavel contracts with horse buyers who purchase horses at auctions throughout the Midwest, West, East, and South. Most of the horses Cavel acquires are from outside the State of Illinois. The horses are transported to Cavel's plant by the horse buyers or by the sellers of the horses. Cavel does not own the horses while they are being transported to the plant and Cavel does not own the trucks transporting the horses.

Tucker testified that the horses are unloaded at the plant under government inspection and examined by a U.S. Department of Agriculture (USDA) veterinarian. Tucker said that Cavel follows a myriad of rules concerning the handling of livestock under the Horse Transportation Law. Cavel has a USDA veterinarian on the premises whenever they are processing horse meat. The horses are ultimately brought to the kill floor, euthanized, and dressed out to carcass form.

Tucker testified further that the horse meat is sold either in fresh carcass form or as boxed meat. The

boxed horse meat is sold either fresh or frozen and it is shipped within a few days to the customer. The fresh horse meat is trucked to an airport and flown to Europe. The frozen horse meat is trucked to rail yards and goes by rail to ports where it is loaded into oceangoing containers and shipped to ports overseas. Tucker indicated that Cavel sells less than 1% of the horsemeat it processes for other than human consumption. Cavel exports 100% of the horsemeat that it processes for human consumption to customers overseas. Generally, Cavel's customers are in the central part of western Europe in countries including Belgium, France, Switzerland, Italy, Germany, and the Netherlands. Cavel sells no horse meat for human consumption in Illinois or in any other state of the United States.

At the conclusion of Mr. Tucker's testimony, plaintiffs moved the admission of four exhibits. Plaintiffs' exhibit No. 2 was a portion of a letter from the Minister of Foreign Affairs of the Kingdom of Belgium to Illinois Governor Rod R. Blagojevich providing that "[g]iven the interest Belgium takes in this type of exportations from Illinois, we will be carefully scrutinizing the compatibility of Horse [*sic*] Bill 1711 with international trade rules, including those existing under the World Trade Organization." Plaintiffs' exhibit No. 3 was a press release from Governor Blagojevich's office. Plaintiffs' exhibit No. 4 was a transcript of proceedings before the House of Representatives of the Illinois General Assembly. Plaintiffs' exhibit No. 5 was a notice of filing in a matter pending before the United States District Court for the District of Columbia.

The court reserved ruling on defendants" motion for a directed verdict[2]. Thereafter, defendants called an official with the USDA who testified regarding the feasibility of using small slaughtering facilities to slaughter multiple species of animals. After hearing argument from the parties, the court took the matter under advisement and extended the temporary restraining order until June 28, 2007, or until the court's ruling, whichever is sooner. On June 19, 2007, the HSUS filed a notice of appeal regarding the court's denial of HSUS' motion to intervene. On June 25, 2007, this court determined that it was divested of jurisdiction and unable to enter further orders on the merits due to the HSUS' notice of appeal. On June 28, 2007, this court denied defendants' motion to reconsider the order of June 25, 2007, and denied plaintiffs' emergency motion for a stay pending appeal. On July 3, 2007, the United States Court of Appeals for the Seventh Circuit reversed this court's order of June 25, 2007, and ordered this court to proceed on the merits of the preliminary injunction motion and to final judgment. This order is now entered in compliance with the Seventh Circuit's order.

II. ANALYSIS

At the outset, the court finds that plaintiffs have not advanced the claims alleged in counts III-VI of their complaint having failed to brief these claims in

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[2] Although counsel referred to this motion as one for a "directed verdict," because this was a hearing before the court sitting without a jury, the court construes defendants' motion as a Rule 52(c) motion for judgment against plaintiffs which the court has the discretion to reserve ruling on until after the close of the evidence. See *Gaffney v. Riverboat Services of Indiana, Inc.*, 451 F. 3d 424, 451 n. 29 (7th Cir. 2007).

their pre-hearing memorandum or to argue them at the Rule 65(a)(2) hearing.[3] Thus, these claims have been abandoned. See *Duncan v. State of Wisconsin Department of Health and Family Services*, 166 F. 3d 930, 934 (7th Cir. 1999) (stating that arguments that a party fails to develop in its brief in any meaningful manner will be deemed waived or abandoned); *McMaster v. United States*, 177 F. 3d 936, 940-41 (11th Cir. 1999) (noting that a claim may be considered abandoned when the allegation is included in plaintiff's complaint but plaintiff fails to present any argument concerning the claim to the district court). Thus, the court grants defendants" Rule 52(c) motion for judgment as a matter of law against plaintiffs as to counts III, IV, V, and VI of the complaint. For the reasons that follow, defendant's Rule 52(c) motion is also granted with respect to counts I, II, and VII.

Under Rule 52(c), "the court may enter judgment as a matter of law . . . with respect to a claim or defense that cannot under the controlling law be maintained . . . without a favorable finding on that issue." Fed. R. Civ. P. 52(c). Rule 52(c) expressly authorizes the district judge to resolve disputed issues of fact. See Fed. R. Civ. P. 52(a) ("Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous."). In deciding whether to enter judgment on partial findings under Rule 52(c), the district court is not required to draw any inferences in favor of the non-moving party; rather, the district court may make

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[3] Upon inquiry by the court, counsel for plaintiffs specifically stated that they were only proceeding on the Commerce Clause, preemption, and police power counts at trial, and would not be presenting any evidence or argument with regard to the other counts.

findings in accordance with its own view of the evidence. *Pinkston v. Madry*, 440 F. 3d 879, 890 (7th Cir. 2006).

The three remaining claims cannot be maintained without a finding that P.A. 95-0002 is unconstitutional. A party seeking a permanent injunction must prove actual success on the merits, lack of adequate remedy at law or irreparable harm, that the equities favor granting the injunction, and that the entry of the injunction will not harm the public interest. *Plummer v. American Institute of Certified Public Accountants*, 97 F. 3d 220, 229 (7th Cir. 1996). Thus, in this case, in order to satisfy the actual success on the merits element, plaintiffs must prove that P.A. 95-0002 is unconstitutional. Plaintiffs also request a declaratory judgment that P.A. 95-0002 is unconstitutional. Because the court finds that plaintiffs have failed to demonstrate any constitutional infirmity in P.A. 95-0002, the court's analysis begins and ends with the plaintiff's constitutional challenges to P.A. 95-0002, and the court need not consider the other elements of injunctive relief.

A. Preemption

Plaintiffs contend that P.A. 95-0002 is expressly preempted by the Federal Meat Inspection Act (FMIA) because P.A. 95-0002 directly regulates the facilities and operations of Cavel's plant in a way that is "in addition to or different than" the FMIA. Defendants argue that the FMIA does not preempt P.A. 95-0002 because the FMIA does not address the slaughtering of horses for human consumption, and certainly does not expressly preclude the activity.

The principle of preemption arises from the Supremacy Clause of the Constitution which states that

"the Laws of the United States . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. "Pursuant to this authority, Congress may preempt state law." *Chambers v. Osteonics Corp.*, 109 F. 3d 1243, 1246 (7th Cir. 1997). "A federal law may preempt a state law expressly, impliedly through the doctrine of conflict preemption, or through the doctrine of field (also known as complete) preemption." *Boomer v. AT & T Corp.*, 309 F. 3d 404, 417 (7th Cir. 2002). At the trial on the merits and in their hearing memorandum, plaintiffs have limited their argument to express preemption and, therefore, the court will not address the other preemption forms.

Among other regulations and definitions applicable to horses, the FMIA contemplates both the pre-slaughter and post-slaughter inspection of animals, including horses, for the production of meat and meat food products in any slaughtering, meat-canning, salting, packing, rendering or similar establishment. 21 U.S.C. § 603(a), § 604. The FMIA also contains an express preemption clause which provides that "[r]equirements within the scope of this chapter with respect to premises, facilities and operations of any establishment at which inspection is provided under subchapter I of this chapter, which are in addition to, or different than those made under this chapter may not be imposed by any State . . ." 21 U.S.C. § 678.

Plaintiffs assert that because P.A. 95-0002 makes it unlawful to slaughter horses for human consumption while the FMIA specifically permits the practice and regulates the premises, facilities, and operations that do so, P.A. 95-0002 is expressly preempted. This court disagrees.

The purpose of the FMIA is to protect the health and welfare of consumers by regulating the production of meat and meat food products to ensure that wholesome, unadulterated, and properly marked, labeled, and packaged meat and meat food products enter commerce. 21 U.S.C. §602. The purpose of the FMIA is not to regulate which meats are to be consumed by humans and which are not. Thus, even though horse meat is included within the class of meat and meat food products that may be capable of use as human food under the FMIA (21 U.S.C. §601(j), (k)), the FMIA does not require that Illinois legalize the slaughter of horses for human consumption or require Illinois to allow commercial trade of horse meat intended for human consumption. Neither the prohibition of the slaughter of horses for human consumption in subsection (a), nor the prohibition of the possession, importing, exporting, selling, buying, giving away, holding or accepting of horse meat intended for human consumption under subsection (b), is an attempt by Illinois to regulate meat inspection requirements with respect to premises, facilities, and operations of establishments at which inspection is provided under the FMIA. Rather, P.A. 95-0002 prohibits a type of animal meat that may be marketed for human consumption. This prohibition is not additional to or different than the FMIA's regulation of the facilities engaged in meat and meat food production, such regulation being indifferent to the type of animal from which these products come.

In *Empacadora De Carnes De Fresnillo v. Curry*, 476 F. 3d 326 (5th Cir. 2007), the Fifth Circuit held that the FMIA did not expressly deprive states of the ability to define what meats may be available to slaughter for human consumption and, therefore,

that a Texas statute similar to P.A. 95-0002 had not been expressly preempted. See *Curry*, 476 F. 3d at 333. The court in *Curry* determined that the express preemption clause of the FMIA limits states in their ability to govern meat inspection and labeling requirements but does not limit a state's ability to regulate what types of meat may be sold for human consumption in the first place. *Curry*, 476 F. 3d at 333.

Plaintiffs acknowledge the holding in *Curry* but argue that the Seventh Circuit's decision in *Chicago-Midwest Meat Association v. City of Evanston*, 589 F. 2d 278 (7th Cir. 1978), dictates the opposite result. In that case, the Chicago-Midwest Meat Association challenged municipal ordinances that authorized the inspection of meat delivery vehicles while the vehicles were on their delivery routes or at points of delivery. *Chicago-Midwest Meat Association*, 589 F. 2d at 280. The district court determined that the ordinances did not conflict with the Wholesome Meat Act of 1967[4] (21 U.S.C. § 601 *et seq.*) (WMA). In rejecting the association's appellate contention that the WMA preempted the ordinances, the court stated that "the supremacy and commerce clauses allow municipalities to enact and enforce ordinances providing for the inspection of meat delivery vehicles at locations other than the premises of the establishments regulated by the [WMA]." *Chicago-Midwest Meat Association*, 589 F. 2d at 280. The court held that the WMA "demonstrates that state regulation 'in addition to, or different' from the federal scheme is impermissible only on the site of the regulated

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[4] The Wholesome Meat Act of 1967 was the former title of the FMIA that contained the same §678 with language verbatim of the current preemption.

establishment[,]" and that the vehicle inspections at issue occurred beyond the premises of the association's members. *Chicago-Midwest Meat Association*, 589 F. 2d at 283.

Plaintiffs argue that *Chicago-Midwest Meat Association* makes clear that federal law would preempt inspections if they take place on the site of a slaughterhouse. Plaintiffs maintain that P.A. 95-0002 directly regulates the facilities and operations of Cavel's plant in a way that is in addition to or different than the FMIA because it dictates how Cavel may use its site by limiting the types of operations in which the company may be engaged.

The flaw in plaintiffs' argument is that P.A. 95-0002 does not regulate meat inspection at all and, therefore, the on-site or off-site distinction drawn in *Chicago-Midwest Meat Association* does not advance their preemption argument. As explained above, P.A. 95-0002 regulates the types of animals that may be slaughtered for human consumption in Illinois not the inspection of the operations and facilities of establishments subject to inspection under the FMIA.

For the foregoing reasons, the court concludes that plaintiffs have not demonstrated that P.A. 95-0002 regulates the premises, facilities, or operations of slaughterhouses. Thus, P.A. 95-0002 is not expressly preempted by § 678 of the FMIA.

B. Dormant Commerce Clause

The Commerce Clause states that "Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes." U.S. Const. Art. I, § 8, cl. 3. Although the Commerce Clause addresses only Congress' power, there is a dormant or negative aspect of the Com-

merce Clause that limits the power of the states to regulate commerce. *Camps Newfound / Owatonna Inc. v. Town of Harrison*, 520 U.S. 564, 571-72, 137 L. Ed. 2d 852, 862, 117 S. Ct. 1590, 1596 (1997). As a result, even in areas where Congress has not spoken, state regulations may violate the Commerce Clause either because the laws discriminate[5] against interstate or foreign commerce, or because they incidently affect such commerce. *DeHart v. Town of Austin, Indiana*, 39 F. 3d 718, 723 (7th Cir. 1994).

1. Foreign Commerce Clause

State regulations that facially discriminate against foreign commerce are virtually *per se* invalid. *Piazza's Seafood World, LLC v. Odom*, 448 F. 3d 744, 750 (5th Cir. 2006). Nondiscriminatory state regulations affecting foreign commerce violate the Foreign Commerce Clause if they (1) create a substantial risk of conflicts with foreign governments or (2) impede the federal government's ability to speak with one voice in regulating commercial affairs with foreign states. *Piazza's Seafood World, LLC*, 448 F. 3d at 750. Consequently, the first question is whether P.A. 95-0002 discriminates against foreign commerce on its face.

a. Facial Discrimination Against Foreign Commerce

Plaintiffs contend that P.A. 95-0002 facially discriminates against foreign commerce because it prohibits the importing of horse meat intended for human consumption to Illinois, and prohibits the exporting of that product from Illinois. Defendants

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[5] Discrimination against commerce, which is subject to heightened scrutiny, may take more than one form, but plaintiffs have limited their arguments to facial discrimination so the court's analysis is also limited to facial discrimination.

maintain that P.A. 95-0002 does not facially discriminate against foreign commerce.

The Supreme Court has defined "discrimination" in the context of the Commerce Clause as differential treatment of local and extra-territorial interests that benefits local interests and burdens extra-territorial interests. *Oregon Waste Systems, Inc. v. Department of Environmental Quality of the State of Oregon*, 511 U.S. 93, 99, 128 L. Ed. 2d 13, 21, 114 S. Ct. 1345, 1350 (1994) ("'discrimination' simply means differential treatment of instate and out-of-state economic interests that benefits the former and burdens the latter"). The Court has also held that a State's preference for domestic commerce over foreign commerce is inconsistent with the Commerce Clause even if the State promulgating the law is not a direct beneficiary of the discrimination. *Kraft General Foods v. Iowa Department of Revenue*, 505 U.S. 71, 79, 120 L. Ed. 2d 59, 68, 112 S. Ct. 2365, 2370 (1992).

Plaintiffs maintain that by prohibiting the import or export of horsemeat for human consumption, the State of Illinois is directly restraining foreign commerce and declaring an unconstitutional embargo against horsemeat. In this respect, plaintiffs challenge the import/export prohibition within subsection (b) of P.A. 95-0002 (225 ILCS 635/1.5(b)). This court finds otherwise.

Subsection (b) does not facially discriminate against foreign commerce because it treats foreign and Illinois interests equally. Subsection (b) prohibits the following activities in Illinois with regard to horse meat intended for human consumption: possessing, importing to, exporting from, selling, buying, giving away, holding, or accepting, any horse meat for human consumption. It is unlawful for any person, whether

that person is an Illinois citizen or a Belgian citizen, to engage in such activities. This is also true whether the person engaging in the unlawful activities is working for an Illinois or a Belgian business entity. There is no disparate treatment of in-state and foreign economic interests.

Plaintiffs argue that P.A. 95-0002 implicates the foreign Commerce clause in both ways that the Fifth Circuit in *Empacadora De Carnes De Fresnillo* believed that the Texas statute did not. Plaintiffs cite the following excerpt from *Empacadora De Carnes De Fresnillo*:

> "This case does not implicate the Foreign Commerce Clause as statutes placing import and export restrictions do, see, e.g., *South-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 104 S. Ct. 2237, 81 L. Ed. 2d 71 (1984), or in the way restrictions on products "used constantly and exclusively . . . in foreign commerce" would. *Japan Line, Ltd. v. Los Angeles County*, 441 U.S. 434, 99 S. Ct. 1813, 60 L. Ed. 2d 336 (1979)." *Empacadora De Carnes De Fresnillo*, 476 F. 3d at 335.

This argument lacks merit. First, implicating the Foreign Commerce Clause is not the same as facial discrimination against foreign commerce. The "import and export" reference in *Empacadora De Carnes De Fresnillo* was used to explain that the court was not going to address the Foreign Commerce Clause. That language is not authority for the notion that impacting foreign commerce is equal to facial discrimination. Second, the court does not agree that horse meat is like the ocean-going container referenced in *Japan Line, Ltd.* that is "used constantly and exclusively" in foreign commerce. For example, horse meat intended for human consumption is ap-

parently used outside of foreign commerce on various dinner tables in Belgium, France, Switzerland, Italy, Germany, and the Netherlands.

Next, plaintiffs argue that P.A. 95-0002 directly discriminates against foreign commerce in the way the Oklahoma law restricting the export of minnows at issue in *Hughes v. Oklahoma*, 441 U.S. 322, 60 L. Ed. 250, 99 S. Ct. 1727 (1979), discriminated against interstate commerce. *Hughes* is quickly distinguished because the Oklahoma law struck down in *Hughes* discriminated on its face. *Hughes*, 441 U.S. at 336-338, 60 L. Ed. 2d at 262-263, 99 S. Ct. at 1736-1737 ("Section 4-115(B) on its face discriminates against interstate commerce. It forbids the transportation of natural minnows out of the State for purposes of sale, and thus 'overtly blocks the flow of interstate commerce at [the] State's borders'" yet does not "limit in any way how these minnows may be disposed of within the State"). In contrast, P.A. 95-0002 is a complete ban on in-state slaughter of horses for human consumption, and on selling, buying, giving away, holding, accepting, and importing to and exporting from Illinois any horse meat intended for human consumption.

In sum, P.A. 95-0002 regulates evenhandedly by imposing a complete ban within the State of Illinois on commerce in horse meat intended for human consumption without regard to who is engaging in such commerce. Thus, the court is not convinced that P.A. 95-0002 is discriminatory but, rather, holds that on its face it regulates evenhandedly.

b. Effect on Foreign Commerce

Because P.A. 95-0002 does not discriminate against foreign commerce, the next question is whether plain-

tiffs have shown that it impermissibly affects foreign commerce. Plaintiffs have proven that Cavel is exporting horsemeat intended for human consumption to Belgium, France, Switzerland, Italy, Germany, and the Netherlands. Plaintiffs have also proven that Cavel is the only company in the United States doing so. As a result, the prohibition of exporting horsemeat for human consumption from Illinois within P.A. 95-0002 affects foreign commerce.

"Nondiscriminatory state regulations affecting foreign commerce are invalid 'if they (1) create a substantial risk of conflicts with foreign governments; or (2) undermine the ability of the federal government to "speak with one voice" in regulating commercial affairs with foreign states.'" *Piazza's Seafood World*, 448 F. 3d at 750, citing *New Orleans S. S. Ass'n v. Plaquemines Port, Harbor & Terminal Dist.*, 874 F. 2d 1018, 1022 (5th Cir.1989) (quoting *Japan Line, Ltd.*, 441 U.S. at 446, 99 S. Ct. 1813).

With regard to creating a substantial risk of conflict, plaintiffs concede that they are unaware of any trading partner taking formal or informal action in response to P.A. 95-0002, but plaintiffs point out that the Belgian Minister for Foreign Affairs has indicated that Belgium has an interest in the horse meat exported from Illinois and will examine the compatibility of P.A. 95-0002 with international trade rules. The mere mention of an intent to examine P.A. 95-0002 does not, in and of itself, indicate a substantial risk of conflict. Furthermore, plaintiffs have failed to demonstrate in any other way a substantial risk of conflict with Belgium or any other foreign government as a result of P.A. 95-0002. First, while plaintiffs have proven that Cavel exports 100% of the horse meat it produces for human consumption

to destinations abroad it has not quantified its total horse meat exports or the amount of horse meat for human consumption exported to any given foreign nation. Moreover, plaintiffs have not proven what percentage of the world horse meat supply comes from Cavel. While plaintiffs have demonstrated that the Kingdom of Belgium has some level of interest in the horse meat exported from Illinois, plaintiffs have not shown how much Illinois horse meat is consumed by Belgians or what percentage of the total amount of horse meat consumed by Belgians is from Illinois. As a result, this court cannot begin to assess the risk of a conflict with Belgium due to the purported burden P.A. 95-0002 exacts on foreign commerce.

Plaintiffs argue that because P.A. 95-0002 flatly bans the export of horse meat for human consumption it impedes the ability of the federal government to speak with one voice in regulating commercial affairs with foreign states and unduly burdens foreign commerce without serving any legitimate state law interest. Plaintiffs have not shown that the federal government has a policy on exporting horse meat for human consumption. The fact that Cavel is the only United States exporter of such products and is no longer permitted to do so under P.A. 95-0002 does not impede the federal government's ability to speak to this issue if it chooses to do so.

2. Interstate Commerce Clause

A challenge to a State law under the dormant Interstate Commerce Clause is also subject to a two-tiered analysis. *Alliant Energy Corporation v. Bie*, 336 F. 3d 545, 546 (7th Cir. 2003). A state or local law may violate the Commerce Clause either because the law discriminates against interstate commerce or because it incidentally affects such commerce. *Alliant*

Energy Corporation, 336 F. 3d at 546. A law that clearly discriminates against interstate commerce in favor of intrastate commerce is virtually invalid *per se*. *Wyoming v. Oklahoma*, 502 U. S. 437, 454, 117 L. Ed. 2d 1, 22, 112 S. Ct. 789, 800 (1992). By contrast, an evenhanded law that only incidentally burdens interstate commerce is subject to the more permissive balancing test under *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 25 L. Ed. 2d 174, 178, 90 S. Ct. 844, 847 (1970). *Alliant Energy Corporation*, 336 F. 3d at 546.

a. Discrimination Against Interstate Commerce

In the context of interstate commerce, discrimination means differential treatment of in-state and out-of-state economic interests that benefit the former and burdens the latter. *United Haulers Association, Inc. v. Oneida-Herkimer Solid Waste Management*, ___ U.S. ___, ___, 167 L. Ed. 2d 655, 664-665, 127 S. Ct. 1786, 1793 (2007). It is unclear whether plaintiffs are making a first-tier argument with regard to interstate commerce. To the extent they are arguing that P.A. 95-0002 discriminates against interstate commerce on its face, the argument is rejected. P.A. 95-0002 treats out-of-state and Illinois interests equally. Subsection (a) prohibits the slaughtering of horses for human consumption. Subsection (b) prohibits the following activities: possessing, importing to Illinois, exporting from Illinois, selling, buying, giving away, holding, or accepting, any horse meat for human consumption. These activities are unlawful whether engaged in by an Illinois citizen or an Indiana citizen. This is also true whether the person engaging in the unlawful activities is working for an Illinois or an Indiana business entity. P.A. 95-0002 regulates evenhandedly by imposing a complete ban

within the State of Illinois on commerce in horse meat intended for human consumption without regard to whether the person engaging in such commerce is from within or without Illinois.

b. Effect on Interstate Commerce

If the legislation "regulates to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142, 25 L. Ed. 2d at 178, 90 S. Ct. at 847. The court finds it unnecessary to engage in *Pike* balancing in this case because plaintiffs have not shown that P.A. 95-0002 has worked a burden on interstate commerce. If a party seeking to invalidate a statute cannot show any burden on interstate commerce, then the dormant Commerce Clause is not implicated and the statute will not be invalidated. *Alliant Energy Corporation v. Bie*, 330 F. 3d 904, 911 (7th Cir. 2003).

The facts presented by plaintiffs only suggest that Cavel may be engaged in interstate commerce. With regard to the upstream aspects of Cavel's operation, Mr. Tucker indicated that most of the horses slaughtered at Cavel are acquired by horse buyers at auctions outside the State of Illinois. However, it is unclear whether the horses are actually purchased outside of Illinois by Cavel's agents on behalf of Cavel or if Cavel purchases the horses after they are acquired by a third-party and the transaction takes place in Illinois. Mr. Tucker testified that Cavel does not own the horses while they are being transported to the plant. The court also notes that plaintiffs failed to establish the number of horses Cavel acquires and slaughters. Thus, to the extent plaintiffs have estab-

lished any effect on interstate commerce in Cavel's acquisition of horses, the court cannot assess the degree of impact on interstate commerce. As for the downstream side of Cavel's operation, Mr. Tucker only testified that:

> "The fresh meat generally goes by air. It goes by—we load it in a truck. It goes to the airport, and its flown out to Europe. The frozen meat goes in an oceangoing container and [is] taken by truck to rail yards and the rail yards to the ports and the ports overseas."

With regard to the fresh horse meat, plaintiffs have not shown that they use an airport outside of Illinois. With regard to the frozen horse meat, plaintiffs have not shown that it is exported from a port outside of the State of Illinois. Moreover, as indicated earlier, plaintiffs failed to present any evidence as to the amount of horse meat Cavel exports. In the court's view these facts at best demonstrate a minuscule impact on interstate commerce.

The foregoing notwithstanding, even if the court assumed *arguendo* that plaintiffs have demonstrated that P.A. 95-0002 burdens interstate commerce, the court finds that plaintiffs have not met their burden of showing that the incidental burden on interstate commerce is excessive compared to the legitimate Illinois interests discussed in section C below. See *DeHart v. Town of Austin, Indiana*, 39 F. 3d 718, 723 (7th Cir. 1994), citing *Hughes*, 441 U. S. at 336, 60 L. Ed. 2d at 262, 99 S. Ct. at 1736 ("The person challenging a statute that regulates evenhandedly bears the burden of showing that the incidental burden on interstate commerce is excessive compared to the local interest.").

In sum, the court finds that plaintiffs have not established that P.A. 95-0002 runs afoul of the dormant Interstate Commerce Clause.

C. Illinois' Police Power

Plaintiffs contend that P.A. 95-0002 is an unconstitutional act beyond the police power of the State of Illinois because it does nothing to promote the public health, morals, safety or welfare of the citizenry of the State of Illinois. Defendants argue that P.A. 95-0002 constitutes a valid exercise of Illinois' police power.

Plaintiffs do not contend that P.A. 95-0002 burdens any fundamental right, therefore the court applies rational basis scrutiny. See *Romer v. Evans*, 517 U.S. 620, 631, 134 L. Ed. 2d 855, 865, 116 S. Ct. 1620, 1627 (1996) ("[I]f a law neither burdens a fundamental right nor targets a suspect class, we will uphold the [law] so long as it bears a rational relation to some legitimate end"). A statute is constitutional under rational basis scrutiny so long as "there is any reasonably conceivable state of facts that could provide a rational basis for the [statute]." *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 313, 124 L. Ed.2d 211, 221, 113 S. Ct. 2096, 2101 (1993). The Supreme Court held:

> "On rational-basis review, . . . a statute . . . comes to us bearing a strong presumption of validity, and those attacking the rationality of the legislative classification have the burden to negative every conceivable basis which might support it. Moreover, because we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged

> distinction actually motivated the legislature. . . . In other words, a legislative choice is not subject to court-room fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *Beach Communications, Inc.*, 508 U.S. at 314-15, 124 L. Ed. 2d at 222, 113 S. Ct. at 2101-02 (internal quotation marks and citations omitted).

The State defendants have advanced (1) the humane treatment of animals, and (2) the regulation of food for human consumption, as legitimate Illinois interests to which P.A. 95-0002 is rationally related. At a minimum this court finds that P.A. 95-0002 passes rational basis scrutiny because it is rationally related to the first interest advanced by the State defendants. Illinois' interest in the humane treatment of animals is a legitimate interest rationally served by the prohibition of the slaughter of horses for human consumption and the commercial trade of horse meat intended for human consumption. The General Assembly could have rationally concluded that because a horse is more agile and has a keener sense of wariness than more docile animals such as cattle, they are more difficult to kill in an orderly and methodical way in a slaughterhouse and, therefore, it is inhumane to slaughter a horse before its useful life as a companion, recreational, or draft animal has come to an end. The General Assembly may have concluded that the more humane practice of euthanizing horses with drugs when they are no longer useful followed by disposal of the carcass through a rendering plant or some other means should be encouraged. Prohibiting the slaughtering of horses for human consumption and banning all manner of commerce in horsemeat intended for human consumption is rationally related to these ends.

In challenging the humane treatment of animals interest, plaintiffs argue that the same interest is addressed by other legislation and that P.A. 95-0002 does not promote that interest because it is lawful to slaughter horses in Illinois for any reason other than for human consumption. First, we have not been made aware of an Illinois law that protects useful horses from premature slaughter or reduces the number of such horses going to slaughter. Second, while it is true that it is still lawful to slaughter healthy, useful, horses for any reason other than for human consumption, that does not render the law incapable of rationally serving its purpose of reducing the practice. Legislatures are permitted to correct a problem incrementally and such steps are not a defect in legislation under rational basis scrutiny. *Beach Communications, Inc.*, 508 U.S. at 316, 124 L. Ed.2d at 223, 113 S. Ct. at 2102; see also *Turner v. Glickman*, 207 F. 3d 419, 426 (7th Cir. 2000).

In addition, the court finds that Illinois' interest in preserving and promoting public morality provides a rational basis for the challenged statute. Regulating the morality of its citizenry is an area traditionally within the State's police power. *Ophthalmic Mutual Insurance Co. v. Musser*, 143 F. 3d 1062, 1066 (7th Cir. 1998). The Illinois General Assembly could have reasonably concluded that, based on our cultural history, our society views horses, along with dogs, cats, and some other creatures, as companion animals[6] that are not the equivalent of ordinary livestock that

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[6] The Illinois Humane Treatment for Animals Act defines "companion animal" as "an animal that is commonly considered to be, or is considered by the owner to be, a pet. 'Companion animal' includes but is not limited to canines, felines, and equines." 510 ILCS 70/2.01a.

is raised for food. Based on that conclusion, the General Assembly may have concluded that it is cruel and immoral to slaughter horses for human consumption or to engage in commercial activity with regard to horse meat intended for human consumption, including exporting it to places outside of Illinois for that purpose. The prohibitions contained in P.A. 95-0002 are also rationally related to the accomplishment of that legitimate Illinois interest. Thus, the court holds that P.A. 95-0002 withstands rational basis review.

III. CONCLUSION

For the foregoing reasons, the court finds that plaintiffs have failed to demonstrate any constitutional infirmity in P.A. 95-0002. Thus, the court grants defendants' Rule 52(c) motion for judgment against plaintiffs.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
Western Division

[Filed JUL 5, 2007]

Case Number: 07 C 50100

CAVEL INTERNATIONAL, INC., *et al.*

v.

LISA MADIGAN, *et al.*

JUDGMENT IN A CIVIL CASE

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.

■ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that this matter comes before the court for a consolidated hearing on injunctive relief pursuant to Rule 65(a)(2) of the Federal Rules of Civil Procedure and for a declaratory judgment. Because plaintiffs have failed to establish any constitutional infirmity in P.A. 95-0002, the court grants defendants' motion for judgment as a matter of law against plaintiffs pursuant to Rule 52(c) of the Federal Rules of Civil Procedure.

All orders in this case are now final and appealable.

Michael W. Dobbins, Clerk of Court

/s/ Susan Wessman
SUSAN WESSMAN, Deputy Clerk

Date: 7/5/2007

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 07-2658

CAVEL INTERNATIONAL, INC., *et al.*,
Plaintiffs-Appellants,

v.

LISA MADIGAN, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Western Division.
No. 07 C 50111—Frederick J. Kapala, *Judge*.

Submitted July 17, 2007—Decided July 18, 2007*

Before EASTERBROOK, *Chief Judge*, and POSNER and ROVNER, *Circuit Judges*.

POSNER, *Circuit Judge*. Cavel International, the principal appellant (we can ignore the others), produces horsemeat for human consumption. The plant at which it slaughters the horses is in Illinois. Americans do not eat horsemeat, but it is considered a delicacy in Europe and Cavel exports its entire output. Its suit challenges the constitutionality of a

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* The appellants' motion for an injunction pending appeal was decided in a brief order (Chief Judge Easterbrook dissenting) with a notation that opinions explaining the ground for the order and the dissent would follow. The opinions are being released in typescript.

recent amendment to the Illinois Horse Meat Act, 225 ILCS 635/1.5, that makes it unlawful for any person in the state to slaughter a horse for human consumption or "to import into or export from this State, or to sell, buy, give away, hold, or accept any horse meat if that person knows or should know that the horse meat will be used for human consumption." Cavel lost in the district court, has appealed, and, after unsuccessfully moving the district court for an injunction pending appeal, has asked us for such an injunction, emphasizing the disastrous consequences for its business if the decision of the district court stands.

An affidavit by the firm's general manager states that it is a virtual certainty that if the injunction is denied the result will be the "permanent closure" of its plant. The state counters feebly with an unattested statement that because Cavel some years ago reopened after a fire had forced it to close for two years, it can probably reopen again if it has to close during the appeal. But there is no contention that Cavel lacked fire insurance to tide it over that earlier period of closure. Should the judgment of the district court upholding the constitutionality of the new statutory amendment be reversed, Cavel could not obtain monetary relief from the defendants. They are state officials sued in their official capacities because the only relief sought against them is an injunction. They therefore are not subject to liability for damages; a suit against state officials in their official capacity is treated as a suit against the state itself.

Cavel has made a compelling case that it needs the injunction pending appeal to avert serious irreparable harm—the uncompensated death of its business. Its showing persuaded the D.C. Circuit to grant

Cavel a stay pending judicial review of an order by the Department of Agriculture that would if upheld force the shutdown of its business on grounds unrelated to those of the present litigation. *Humane Society of the United States v. Cavel International, Inc.*, No. 07–5120 (D.C. Cir. May 1, 2007) (per curiam). The state does not question the gravity of Cavel's situation (despite the remark about the fire) but responds that the state will incur irreparable harm, too, if the injunction is granted, because a "slaughter cannot be undone." But the statute does not seem to be intended to protect horses. (The object of the statute is totally obscure.) For it is only when horsemeat is intended for human consumption—the niche market that Cavel serves (less that 1 percent of its output is sold for other consumption)—that a horse cannot be killed for its meat. Were Cavel or a successor able to find a market in pet-food companies, the slaughter of horses at its plant would continue without interference from the state. And, if not, all that will happen is that horses will be slaughtered elsewhere to meet the demands of the European gourmets.

The state argues that the injunction will diminish "the scope of democratic governance." That is a powerful reason for judicial self-restraint when a statute, state or federal, is sought to be invalidated by a court. A *rule* barring state statutes from going into effect until any challenges to their validity were litigated to completion would be offensive on that ground; it would amount to rewriting the effective date in all Illinois statutes. But at issue is a *stay*, based on a showing in a particular case that the harm to the challenger from denial of a stay would greatly exceed the harm to the state from its grant, that would delay the application of the statute to the

challenger for a few months (the appeal in this case has been expedited and will be argued on August 16). Such a stay does not operate as a statutory revision or significantly impair democratic governance. It is a detail that because the statute in question is applicable to only a single entity, a stay of enforcement against that entity acts to postpone the effective date of the statute rather than just to postpone the statute's application to one entity subject to it. The state does not argue that a statute can never be enjoined pending appeal; it concedes, as we shall see, that such an injunction is appropriate if the usual criteria for a stay pending appeal are satisfied. The horsemeat statute is remote from the vital interests of most Illinois residents; a brief delay in its enforcement against Cavel will not create a perceptible harm. Indeed, it is difficult to see what harm would ensue from permanently abrogating the statute if the welfare of horses would not be affected, as it might well not be, as we have pointed out.

Even though denying the injunction pending appeal would do far more harm to Cavel than granting it would do to the state, we must consider whether the appeal has any merit. If an appeal has no merit at all, an injunction pending the appeal should of course be denied. But if the appeal has some though not necessarily great merit, then the showing of harm of the magnitude shown by Cavel in this case would justify the granting of an injunction pending appeal provided, as is also true in this case, that the defendant would not suffer substantial harm from the granting of the injunction. This is the "sliding scale" approach to decisions on motions for preliminary injunction that we have endorsed in previous cases, e.g., *Christian Legal Society v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006); *FoodComm Inter-*

national v. Barry, 328 F.3d 300, 303 (7th Cir. 2003); *American Hospital Supply Corp. v. Hospital Products Ltd.*, 780 F.2d 589, 593–94 (7th Cir. 1985), as have other courts. E.g., *Serono Labsoratories, Inc. v. Shalala*, 158 F.3d 1313, 1317–18 (D.C. Cir. 1998); *Dan River, Inc. v. Icahn*, 701 F.2d 278, 283 (4th Cir. 1983). It amounts simply to weighting harm to a party by the merit of his case.

In denying the motion for an injunction pending appeal, the district court did not apply this test or indeed any other. He said only that Cavel had failed to make a "strong showing" that the horsemeat amendment is unconstitutional. He ignored the balance of harms. Cavel's failure to make a strong showing is certainly relevant to the granting of relief, but it is not decisive. The judge did not exercise the required discretion in determining whether to grant the injunction, and so his decision is not entitled to the deference to which discretionary rulings are entitled. Nor is his ruling that Cavel failed to make a strong showing of likelihood to prevail entitled to deference. It was a legal ruling the appellate review of which is plenary. *Hinrichs v. Bosma*, 440 F.3d 393, 396 (7th Cir. 2006).

There is a difference between asking a district court for a preliminary injunction and asking a court of appeals for a stay of, or other relief from, the district court's ruling. But the sliding-scale approach is also applied in such a case. *Id.*; *Sofinet v. INS*, 188 F.3d 703, 706–07 (7th Cir. 1999); *In re Forty-Eight Insulations, Inc.*, 115 F.3d 1294, 1300–01 (7th Cir. 1997); cf. *Hilton v. Braunskill*, 481 U.S. 770, 777–78 (1987). As the Supreme Court explained in *Hilton*, "different Rules of Procedure govern the power of district courts and courts of appeals to stay an order

pending appeal. See Fed. Rule Civ. Proc. 62(c); Fed. Rule App. Proc. 8(a). Under both Rules, however, the factors regulating the issuance of a stay are generally the same." *Id.* at 776.

Cavel, it is true, is not seeking a stay; it is seeking to enjoin the enforcement of the horsemeat statute against it pending appeal. But Rule 8(a)(1)(C), (2), of the appellate rules explicitly authorizes the court of appeals to grant an injunction pending appeal and does not suggest that the standard is different from that applicable to a motion to stay the district court's judgment. We are mindful that Chief Justice Rehnquist, in a chambers opinion (and thus speaking only for himself and not for any of the other Justices), *Brown v. Gilmore*, 533 U.S. 1301 (2001), held that the authority to grant such an injunction is conferred not by Rule 8 but by the All Writs Act, 28 U.S.C. § 1651. Traditionally of course the applicant for relief under the Act must show an incontrovertible right to relief, and not merely some likelihood of prevailing. The Chief Justice required the same high showing by an applicant for an injunction pending appeal. As the 1967 Committee Note to Rule 8 points out, however, the Supreme Court had held that the power was an inherent judicial power; and so it doesn't have to be grounded in the All Writs Act.

The approach proposed in *Brown* has not caught on. The decision has been cited in seven cases. One was another chambers opinion by Chief Justice Rehnquist. *Wisconsin Right to Life, Inc. v. FEC*, 542 U.S. 1305, 1305–06 (2004). The other six (five district court opinions and an unpublished court of appeals opinion) do not actually apply the Chief Justice's heightened standard to requests for injunctions against state statutes. *In re McEvily*, 55 Fed. Appx.

712 (4th Cir. 2003); *Do The Hustle, LLC. v. Rogovich*, No. 03 Civ. 3870, 2003 WL 21436215, at *8 (S.D.N.Y. June 19, 2003); *Line Communications Corp. v. Reppert*, 265 F. Supp. 2d 353, 358 (S.D.N.Y. 2003); *Foster v. Argent Mortgage Co.*, No. 07– 11250, 2007 WL 2109558, at *4 (E.D. Mich. July 23, 2007); *Smith v. Directors of the Enemy of Alien Control Unit of Dept. of Justice*, No. 07CV0508LJOTAG, 2007 WL 1655780, at *2 (E.D. Cal. June 7, 2007); *Lawrence v. Reno*, No. 00 Civ. 4559, 2003 U.S. Dist. LEXIS 14867 (S.D.N.Y. Aug. 28, 2003). In *Purcell v. Gonzales*, 127 S. Ct. 5 (2006) (per curiam), the Supreme Court vacated an injunction against a state statute pending appeal without suggesting that any special standard applied to such injunctions and without citing *Brown v. Gilmore*. See also *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 842 n. 1 (D.C. Cir. 1977). The state in our case does not cite *Brown* but instead relies on our *Hinrichs* decision, which says nothing about an incontrovertible right of relief, but instead asks the district court to consider merely whether the movant has a significant probability of prevailing on his claim.

The sliding scale justifies the injunction sought by Cavel. The argument for the invalidity of the horsemeat statute is not negligible. A state can without violating the commerce clause in Article I of the U.S. Constitution (which has been interpreted to limit the power of states to regulate foreign and interstate commerce even in the absence of applicable federal legislation) forbid the importation into the state of dangerous or noxious goods. E.g., *Maine v. Taylor*, 477 U.S. 131, 151–52 (1986). But this case involves a limitation on exports, because Cavel has no domestic market; and the only ground that Illinois advances for the horsemeat amendment is "public

morality." The state has a recognized interest in the humane treatment of animals within its borders, and we can assume that this interest embraces the life of the animals and not just a concern that they not be killed gratuitously or in a painful manner. But as we noted earlier, the Illinois statute does not forbid the killing of horses, but only the killing of them for human consumption of their meat. If Cavel could (as apparently it cannot) develop a market for its horsemeat as pet food, there would be no violation of the statute. So it is possible that the burden that the statute places on the foreign commerce of the United States is not offset by a legitimate state interest, in which event the statute is unconstitutional. *Kassel v. Consolidated Freightways Corp. of Delaware*, 450 U.S. 662, 669–70 (1981). "[T]he incantation of a purpose to promote the public health or safety does not insulate a state law from Commerce Clause attack" *Id.* at 670. Since Cavel has no significant domestic market, the statute does not "discriminate" against the foreign commerce of the United States, but it does burden it and so the state is obliged to give some reason for it.

We do not suggest that Cavel has a winning case or even a good case (the Fifth Circuit in *Empacadora de Carnes de Fresnello, S.A. v. Curry*, 476 F.3d 326, 336–37 (5th Cir. 2007), recently upheld a similar Texas law against a challenge based on the commerce clause), but only that it has a good enough case on the merits for the balance of harms to entitle it to an injunction pending an expedited appeal that will enable the merits to be fully briefed and argued. It is important to note in this regard that the sliding-scale approach that governs Cavel's request for an injunction pending appeal does not require a "strong showing" that the applicant will win his appeal. The

Supreme Court was precise in stating in *Hilton v. Braunskill, supra*, 481 U.S. at 776, that among "the factors regulating the issuance of a stay are . . . whether the stay applicant has made a strong showing that he is likely to succeed on the merits." Certainly that is one of the factors to be considered, but it has to be balanced against the harms to the parties of granting or denying the injunction.

EASTERBROOK, *Chief Judge*, dissenting. My colleagues assume that, when deciding whether to issue an injunction pending appeal, both the trial and appellate courts should use the same sliding scale that a district judge uses when deciding the case as an initial matter. This is a mistake. Once a plaintiff has litigated and lost, a higher standard is required for an injunction pending appeal.

That's one conclusion of *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). *Hilton* holds that a stay of a district court's order pending appeal requires a "strong showing" that the appellant is likely to prevail. The Court equated appellate stays and injunctions pending appeal, both of which fall under Fed. R. App. P. 8. One cannot escape this by appealing to "inherent judicial power" (slip op. 5); once a rule has codified an approach, the rule must be followed to the exclusion of the common-law doctrines that preceded it. See *Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988). Cf. *Cheney v. United States District Court*, 542 U.S. 367, 381 (2004) (the applicant must show a "clear and indisputable" right to obtain equitable relief under the All-Writs Act, 28 U.S.C. §1651).

So I ask (as my colleagues do not) whether plaintiff has made out a "strong showing" that this court is likely to reverse on the merits. It has not done so. Cavel's position is functionally identical to the one raised, and rejected, in *Empacadora de Carnes de Fresnello, S.A. v. Curry*, 476 F.3d 326 (5th Cir. 2007). My colleagues do not say that the fifth circuit is mistaken; all they are willing to venture is that the statute just might burden foreign commerce. That's a distraction, however, for Illinois does not discriminate against foreign (or interstate) commerce. No

one in Illinois may slaughter a horse for human consumption, no matter where the meat will be eaten. 225 ILCS 635/1.5(a). That no one in Illinois *wants* to eat horse flesh means that all of Cavel's product is exported, but this does not convert a law regulating horse slaughter (an intra-state activity) into one that discriminates against commerce.

If the (potential) problem in the law lies in subsection (b), which forbids the export of meat produced in violation of subsection (a), then the injunction should be directed against enforcement of subsection (b). Such an injunction would do Cavel no good, however, because the prohibition in subsection (a) against killing and butchering the horses would remain. It is telling that my colleagues enjoin operation of the statute as a whole, without suggesting that the rule against slaughtering a horse for human consumption— the only part of the law that injures Cavel—is subject to any non-frivolous legal objection given the Supreme Court's tolerant approach to even silly statutes that regulate business. See, e.g., *New Orleans v. Dukes*, 427 U.S. 297 (1976).

Although a "strong showing" on the merits is required for any injunction pending appeal, insisting on a significant likelihood of success is especially apt when the subject is enforcement of a statute. An injunction pending appeal does not permanently frustrate attainment of the state's goal. It does, however, permanently discard the statute's effective date. This provision won't be enforced at some later time; it will *never* be enforced. It is as if the majority had held that the norm under the Illinois Constitution of 1970—that laws take effect on the June 1 following their enactment—violates federal law and must be replaced by something along the lines of: "No

state law that imposes a substantial cost on any private interest may take effect until all judicial challenges have been exhausted." But my colleagues don't explain what federal rule requires this displacement of the state's choice of an effective date. An unspoken (and unjustified) norm of judicial supremacy lies behind this claim of power to override the state's decision.

Almost all laws cause injury; very few statutes are Pareto-superior (meaning that no one loses in the process, and at least some people gain). When a rule benefits some persons without injuring others, there is no need for legislation; the people involved will reach the accommodation on their own. Laws that cause loss to some persons (Cavel, for example) create transition effects. How these should be accommodated is itself a question for democratic choice. Some scholars favor immediate change, with the losers not being compensated. See, e.g., Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 Harv. L. Rev. 506 (1986). Illinois has opted a longer period as a rule, although allowing the legislature to provide for immediate effectiveness of statutes enacted before June 1, or by a super-majority.[†] Usually both the gains and losses of effective dates are felt by the

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[†] Article 4 Section 10 of the Illinois Constitution provides: "The General Assembly shall provide by law for a uniform effective date for laws passed prior to June 1 of a calendar year. The General Assembly may provide for a different effective date in any law passed prior to June 1. A bill passed after May 31 shall not become effective prior to June 1 of the next calendar year unless the General Assembly by the vote of three-fifths of the members elected to each house provides for an earlier effective date." The Illinois Horse Meat Act became law on May 24, 2007, and took effect the same day by virtue of §99 in the statute.

state's populace; there is no reason to distrust the state's conclusion that the gains from swift effectiveness exceed the losses.

No state of which I am aware—and no federal law or serious student of the subject—has advocated the rule: "Laws that impose losses large enough to prompt people to hire lawyers take effect only at the conclusion of federal judicial review." Such a rule not only denies states part of their legislative power but also leads to strategic behavior: people hire lawyers and file suits not because they expect to win, but just because they can benefit from delay. That's a fair characterization of this suit. Just as the state won't compensate Cavel for losses in the interim if Cavel wins in the end, Cavel does not propose to compensate Illinois for any injury caused by delayed effectiveness of the statute. The majority does not require Cavel to post an injunction bond. Requiring an applicant to back its position with a promise to pay would curtail strategic claims.

Federal courts should allow states to select and enforce effective dates for their statutes. Equitable relief is appropriate only when the plaintiff shows a substantial likelihood of winning. Cavel has not met this standard and is not entitled to an injunction pending appeal.

APPENDIX D

Public Act 095-0002
HB1711 Enrolled

An ACT concerning horses.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 5. The Illinois Horse Meat Act is amended by adding Section 1.5 as follows:

(225 ILCS 635/1.5 new)

Sec. 1.5. Slaughter for human consumption unlawful.

(a) Notwithstanding any other provision of law, it is unlawful for any person to slaughter a horse if that person knows or should know that any of the horse meat will be used for human consumption.

(b) Notwithstanding any other provision of law, it is unlawful for any person to possess, to import into or export from this State, or to sell, buy, give away, hold, or accept any horse meat if that person knows or should know that the horse meat will be used for human consumption.

(c) Any person who knowingly violates any of the provisions of this Section is guilty of a Class C misdemeanor.

(d) This Section shall not apply to:

(1) Any commonly accepted noncommercial, recreational, or sporting activity.

(2) Any existing laws which relate to horse taxes or zoning.

(3) The processing of food producing animals other than those of the equine genus.

(225 ILCS 635/14 rep.) (from Ch. 56 1/2, par. 253)

Section 7. The Illinois Horse Meat Act is amended by repealing Section 14.

Section 10. The Animals Intended for Food Act is amended by changing Section 2.1 as follows:

(410 ILCS 605/2.1) (from Ch. 8, par. 107.1)

Sec. 2.1. When in the interest of the general public and in the opinion of the Department of Agriculture it is deemed advisable, the Department has authority to quarantine or restrict any and all animals intended for human consumption that contain poisonous or deleterious substances which may render meat or meat products or poultry or poultry products from such animals or poultry injurious to health; except in case the quantity of such substances in such animals does not ordinarily render meat or meat products or poultry or poultry products from such animals injurious to health.

The Department or its duly authorized agent shall investigate or cause to be investigated all cases where it has reason to believe that animals intended for human consumption are contaminated with any poisonous or deleterious substance which may render them unfit for human consumption.

The Department or its duly designated agent in performing the duties vested in it under this Act is empowered to enter any premises, barns, stables, sheds, or other places for the purposes of administering this Act.

The Department may allow the sale or transfer of animals under quarantine or restriction subject to reasonable rules and regulations as may be prescribed.

For the purposes of this Act, the term "Animal" means cattle, calves, sheep, swine, ~~horses, mules or other equidae~~, goats, poultry and any other animal which can be or may be used in and for meat or poultry or their products for human consumption.

(Source: P.A. 77-2117.)

Section 15. The Illinois Equine Infectious Anemia Control Act is amended by changing Section 4 as follows:

(510 ILCS 65/4) (from Ch. 8, par. 954)

Sec. 4. Tests of equidae entering the State. All equidae more than 12 months of age entering the State for any reason ~~other than for immediate slaughter~~ shall be accompanied by a Certificate of Veterinary Inspection issued by an accredited veterinarian of the state of origin within 30 days prior to entry and shall be negative to an official test for EIA within one year prior to entry. ~~Equidae entering the State for immediate slaughter shall be accompanied by a consignment direct to slaughter at an approved equine slaughtering establishment.~~

(Source: P.A. 86-223.)

Section 20. The Humane Care for Animals Act is amended by changing Sections 5 and 7.5 as follows:

(510 ILCS 70/5) (from Ch. 8, par. 705)

Sec. 5. Lame or disabled horses. No person shall sell, offer to sell, lead, ride, transport, or drive on

any public way any equidae which, because of debility, disease, lameness or any other cause, could not be worked in this State without violating this Act~~, unless the equidae is being sold, transported, or housed with the intent that it will be moved in an expeditious and humane manner to an approved slaughtering establishment~~. Such equidae may be conveyed to a proper place for medical or surgical treatment or~~,~~ for humane keeping or euthanasia~~, or for slaughter in an approved slaughtering establishment~~.

A person convicted of violating this Section or any rule, regulation, or order of the Department pursuant thereto is guilty of a Class A misdemeanor. A second or subsequent violation is a Class 4 felony.

(Source: P.A. 92-650, eff. 7-11-02.)

(510 ILCS 70/7.5)

Sec. 7.5. Downed animals.

(a) For the purpose of this Section a downed animal is one incapable of walking without assistance.

(b) No downed animal shall be sent to a stockyard, auction, or other facility where its impaired mobility may result in suffering. An injured animal other than those of the equine genus may be sent directly to a slaughter facility.

(c) A downed animal sent to a stockyard, auction, or other facility in violation of this Section shall be humanely euthanized, the disposition of such animal shall be the responsibility of the owner, and the owner shall be liable for any expense incurred.

If an animal becomes downed in transit it shall be the responsibility of the carrier.

(d) A downed animal shall not be transported unless individually segregated.

(e) A person convicted of violating this Section or any rule, regulation, or order of the Department pursuant thereto is guilty of a Class B misdemeanor. A second or subsequent violation is a Class 4 felony, with every day that a violation continues constituting a separate offense.

(Source: P.A. 92-650, eff. 7-11-02.)

Section 25. The Humane Slaughter of Livestock Act is amended by changing Section 2 as follows:

(510 ILCS 75/2) (from Ch. 8, par. 229.52)

Sec. 2. As used in this Act:

(1) "Director" means the Director of the Department of Agriculture of the State of Illinois.

(2) "Person" means any individual, partnership, corporation, or association doing business in this State, in whole or in part.

(3) "Slaughterer" means any person regularly engaged in the commercial slaughtering of livestock.

(4) "Livestock" means cattle, calves, sheep, swine, horses, mules, goats, and any other animal which can or may be used in and for the preparation of meat or meat products for consumption by human beings or animals. <u>"Livestock", however, does not include horses, mules, or other equidae to be used in and for the preparation of meat or meat products for consumption by human beings, which is prohibited under</u>

Section 1.5 of the Illinois Horse Meat Act.

(5) "Packer" means any person engaged in the business of slaughtering or manufacturing or otherwise preparing meat or meat products for sale, either by such person or others; or of manufacturing or preparing livestock products for sale by such person or others.

(6) "Humane method" means either (a) a method whereby the animal is rendered insensible to pain by gunshot or by mechanical, electrical, chemical or other means that is rapid and effective, before being shackled, hoisted, thrown, cast or cut; or (b) a method in accordance with ritual requirements of the Jewish faith or any other religious faith whereby the animal suffers loss of consciousness by anemia of the brain caused by the simultaneous and instantaneous severance of the carotid arteries with a sharp instrument.

(Source: Laws 1967, p. 2023.)

Section 97. Severability. The provisions of this Act are severable under Section 1.31 of the Statute on Statutes.

Section 99. Effective date. This Act takes effect upon becoming law.

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Statutes amended in order of appearance

225 ILCS 635/1.5 new	
225 ILCS 635/14 rep.	from Ch. 56 1/2, par. 253
410 ILCS 605/2.1	from Ch. 8, par. 107.1
510 ILCS 65/4	from Ch. 8, par. 954
510 ILCS 70/5	from Ch. 8, par. 705
510 ILCS 70/7.5	
510 ILCS 75/2	from Ch. 8, par. 229.52

APPENDIX E

SEVENTH CIRCUIT COURT OF APPEALS

Case No. 07-2658

CAVEL INTERNATIONAL, INC., *et al.*

v.

LISA MADIGAN, *et al.*

Transcript of Oral Argument, August 16, 2007

Chief Judge Easterbrook: Good afternoon, ladies and gentlemen. We're ready to hear argument now on the case of Cavel International against Madigan. Mr. Calabrese.

Mr. Calabrese: May it please the Court. Phil Calabrese on behalf of Cavel International and the individual Plaintiffs. Plaintiffs acknowledge the broad discretion enjoyed by the state in legislating to protect the health, safety, and welfare of its citizens. This case presents one of the rare circumstances, however, in which the burden on commerce, and foreign commerce in particular, is so great, and the state's interest so slight, that the statute does not withstand constitutional scrutiny. The goal of Illinois House Bill 1711, whatever interest the state wants to assert now on appeal to try to rationalize and justify that burden, the goal of the statute is clear. It's an attempt to restrict the culinary options available to Europeans who happen to consume the product processed by Cavel, and are in fact its only consumers. And the statute affects this interest by taking . . .

Judge Posner: Well, the Governor's signing statement refers to the desirability of protecting horses from being killed. So, isn't that a legitimate state interest?

Mr. Calabrese: That is a legitimate state interest, but it's not one that's advanced by this bill, Your Honor. The state, as we acknowledge in the briefing, has an interest in promoting the welfare of animals, but House Bill 1711 has nothing to do with that interest. Under the statute, it remains perfectly legal today for you or for me to step outside this courthouse and to slaughter any number of horses that we want.

Judge Posner: Well, but, according to one of the amicus briefs, you pay for horses; but, if a person who has a horse wants to get rid of it, it has to pay. I mean, if the horse dies, it has to pay to get it hauled off and would have to pay to have it euthanized if it hadn't died yet. So, isn't that an inducement to sell horses to you rather than let them live a little longer? If you sell a horse to you, presuming while it's still healthy because the regulations on slaughtering wouldn't allow you, I assume, to, to make food out of an unhealthy horse. If you sell the horse to you while it's healthy, you get paid. If you wait until the horse dies, or if it's so decrepit that you want it killed, you have to pay.

Mr. Calabrese: Right, I . . .

Judge Posner: And, of course, the difference between being paid and having to pay becomes an inducement for the death of the horse earlier.

Mr. Calabrese: Well, there are clearly market forces at play here, as are set out in the amicus brief, in particular, of the Illinois Farm Bureau and the Horsemen's Council. But, the intervention in the market, here, I mean, that decision that you're

referring to, the decision of any individual horse owner to sell remains with the individual owner of the horse and if they don't want to sell . . .

Judge Posner: But, look, there's only one place, there's only one thing to do with an old horse—I mean, there's only, as far as . . . at least according to the amicus brief, but you haven't said anything to—I mean, you haven't presented any evidence to the contrary. The only market is Cavel. And if, and if you don't sell to Cavel for $300 or whatever you get, you have to pay to get rid of the horse, so . . .

Mr. Calabrese: But if the end use to which Cavel puts the horse . . .

Judge Posner: Suppose you can turn in your old relatives, you know, and get paid or something like that, they would die sooner, right? I mean, that's just basic commerce.

Mr. Calabrese: The evidence in the record is that Cavel discloses the use to which . . .

Judge Posner: Oh sure. No, no, I'm not suggesting any fraud. I am just suggesting you put a person to the choice—he has a market for the horse, the obvious being killed, and the alternative is to hold onto the horse until it dies naturally or becomes so decrepit that it has to be killed. But in the latter case, he has to pay. So, at the margin there are going to be some people who say: well, rather than let old Dobbins, you know, out to pasture for his golden years, we're going to sell him to Cavel and get some money for him.

Mr. Calabrese: Yes, and that's the decision that rests with the individual horse owner.

Judge Posner: It rests with the individual, all these things rest with the individual, but a state is allowed

to intervene and say, I assume it's allowed to intervene and say: we prefer the welfare of the horses to the autonomy of choice of the owners.

Mr. Calabrese: Subject to the limitations of the commerce clause scrutiny, which requires . . .

Judge Posner: Well, how much scrutiny does it get because it's not a case where the law is based on a preference for a local competitor. Right?

Mr. Calabrese: Right.

Judge Posner: It's not as if they say . . . it's not as if the concern were: this is a foreign-owned slaughterhouse rather than an Illinois slaughterhouse. That would be clear cut discrimination in favor of the locals that would be questionable. This is balancing some animal rights conception against commercial freedom and, you know, freedom to export and those are very difficult to balance, aren't they?

Mr. Calabrese: Well, two points. First of all, I think there is evidence in the record in the legislative history that this is invidious discrimination that is driven at some level by the fact that ultimately the meat is being exported to Europeans who are consuming it and that ultimately this is a business that benefits and is owned by foreigners. So that is in the record. On top of that . . .

Judge Posner: Well, I don't think you can infer that there's hostility to foreigners. I mean, surely the purpose of protecting horses is more important than preventing Belgians from indulging their taste for horsemeat, isn't it?

Chief Judge Easterbrook: Is there any reason, . . . Let me put that a different way: is there any reason to believe that if there were a club of horse eaters in

Chicago and they, you know, met every once in a while and ate a horse, that the state legislature would not have passed this law?

Mr. Calabrese: It was well understood when the legislature enacted this law that Cavel was the only company in the United States engaged in . . .

Chief Judge Easterbrook: That's not my question.

Mr. Calabrese: this slaughter. . . . There's just no—I'm sorry, if you could repeat your question.

Chief Judge Easterbrook: The question is: is there any reason to believe that if there were a demand for horsemeat for human consumption in the United States, the state would not have passed this law?

Mr. Calabrese: There's no evidence one way or the other on that point. The evidence in . . .

Chief Judge Easterbrook: If there isn't any evidence, why don't we have to treat this as a law about animal welfare rather than a law about what's on the table in Brussels?

Mr. Calabrese: This is a law about what's on the table in Brussels because of the commerce in this particular product.

Judge Rovner: Well, but given that Cavel provides less than 1% of the horsemeat that is consumed in Europe, how does the statute burden foreign commerce except in a very, very negligible way?

Mr. Calabrese: The foreign commerce clause protects the United States and the ability of United States citizens and American businesses to participate in foreign commerce and foreign trade. The relevant market here is the United States export market in this particular product, and the fact that

the state and the amici are referencing those statistics demonstrates what the true aim of the statute is.

Judge Rovner: But, you haven't answered my question. I'm not understanding how the statute—when you view the percentage—how can that burden foreign commerce, as I say, except in the most negligible way? I mean, we know that it doesn't burden interstate commerce at all because there's a ban on human consumption of horsemeat in the United States.

Mr. Calabrese: It burdens foreign commerce by prohibiting 100% of the market in this export market. All of the foreign commerce in this product is restricted by this statute.

Chief Judge Easterbrook: Look, none of this has anything to do with discrimination, and it looks like you are just arguing the flip side of the contention in the *National Paint* case where Chicago bans big magic markers and spray paint and all of that paint is imported into Chicago from other states—none is made in Chicago. But we said that that's not a form of discrimination against commerce because it bans local and imported paint equally.

Mr. Calabrese: Yes, and I think that there's a couple points there. One is that there's a difference between import and export restrictions. And two . . .

Chief Judge Easterbrook: They're completely reciprocal. What we said was, if we could treat it as discrimination, if there were a good reason to think that the reason spray paint had been prohibited was that it was being made in Indiana—and people were envious of Indiana or wanted to hurt the people in Indiana—but the only suggestion was that it was prohibited because Chicago didn't want graffiti sprayed.

We're just in the flip side here. If there's reason to think that this was adopted because people want to change what's for lunch in Brussels, that's one thing. But if it's adopted because of animal welfare concerns, that's a totally nondiscriminatory basis.

Mr. Calabrese: The fact here is that the best evidence of legislative intent is the plain language of the statute and everyone understood when this law was enacted that that's what it was about. It was about cutting off the exports.

Judge Posner: Well, wait, you're saying two different things. The language doesn't say: we don't like foreigners eating horsemeat. And you know, the Governor states, it's kind of strange, I was surprised, but he attributes this statute in significant part to the actress Bo Derek, whose family comes from Illinois. And I know he said, the Governor: they would be proud of the actions taken on behalf of our horses—Governor Blagojevich. So, that doesn't sound as if there's anything involved in the case except a concern about horses' welfare. It's tenuous, but that seems to be the only motive. And, also, even assuming that there's more to burdens on foreign commerce than discrimination in favor of locals, you know, we don't have a submission by the State Department or anything of that sort to suggest that Illinois is trying to administer its own foreign policy. That would be very objectionable, right? They say: we don't like the French and we're going to punish them by denying them horsemeat. Right? That would be an interference with the federal prerogatives. But there's no suggestion of that. You do have that letter from the Belgian government but it's very ambiguous. They don't say: this is an affront to Belgium; they say: we're watching this. So wouldn't it be better for us to

assume there's no significant interference with the foreign relations or foreign commerce of the United States unless we're given some, you know, authoritative indication to the contrary?

Mr. Calabrese: On that point, the foreign commerce clause protects against the risk of such conflict and there is risk of that conflict here. In terms of the interests of the statute, . . .

Chief Judge Easterbrook: Let me ask Judge Posner's question in a slightly different way. Are there any decisions of the Supreme Court finding a violation of the dormant foreign commerce clause where the State Department has not filed, at a minimum, an amicus brief saying that the state law has interfered with foreign relations?

Mr. Calabrese: From the Supreme Court, no. [There's] the Fifth Circuit decision in *Piazza* and from the Supreme Court we have the statement in *Container Corp.* that it's not dispositive, that such matters are not dispositive.

Chief Judge Easterbrook: They may say it's not dispositive, but if the number of such cases is zero and, certainly I couldn't find any. The most recent case that seems pertinent, *Barclay's Bank*, suggests that it's not dispositive in the sense that, even when the State Department howls, that won't condemn a state statute. But I haven't seen any case or any suggestion from the Supreme Court that when the State Department sees no problem for our foreign relations, a state statute would be declared invalid.

Mr. Calabrese: I don't think that that's a necessary requirement for the level of discrimination or burden on commerce that would otherwise suffice.

Chief Judge Easterbrook: Why isn't it necessary? Otherwise, you're asking the judiciary to have its own foreign policy. I can understand arguments that, you know, the judiciary ought to defer—we don't accept blindly foreign policy statements by the President who conducts it. But, the idea that the actual foreign policy people would be silent and the judicial branch would have its own foreign policy seems a little . . .

Mr. Calabrese: I don't think they have been silent here and the United States has, in the D.C. litigation, taken the position that Cavel ought to remain open until the conclusion of that case and there's also federal interest here . . .

Chief Judge Easterbrook: There's been plenty of opportunity to ask the State Department or the Solicitor General to file an amicus brief here, they obviously haven't been willing to do so.

Mr. Calabrese: Such things take time, your Honor, especially in these summer months.

Judge Rovner: [Inaudible]

Judge Posner: On another . . . [to] change the subject slightly. Can't Cavel locate, relocate, to one of the states in which this slaughtering of horses is still legal?

Mr. Calabrese: Conceivably. However, that gets into the burdensome issue because in the commerce clause analysis you do ask the question about: well, what if every state adopted the ban? And then Cavel wouldn't be able to move and there are cases where you could say that in every case involving a state statute.

Judge Rovner: According to the transcript of the Illinois house debate on the statute, the plant that

was forced to close in Texas refitted the facility and reopened it as a cattle and bison slaughter facility. Could Cavel do the same things? Because it seems to import most of their horses from other states, and I take it it could do the same with cattle or . . .

Mr. Calabrese: The evidence here, Your Honor, is no—that that could not be done. This was a plant that was built for the specific purpose of slaughtering horses for export for human consumption.

Judge Rovner: Well, but then what are the vast differences between Cavel and the plants in Texas?

Mr. Calabrese: That starts getting into sort-of equipment and technology refitting type issues. The evidence in the trial court on that is that the use here has always been, for the twenty years that Cavel has operated, for the one purpose and that it could not be converted as you suggest.

Judge Rovner: Is this dispute going to be mooted if the USDA is prohibited from inspecting the plant?

Mr. Calabrese: The D.C. litigation is progressing. There is not yet, to my knowledge, a briefing schedule in that case. So, I would hazard a guess that we'll have a ruling here before there.

Judge Rovner: And you know, something that I was really wondering about is this: whether or not there's a factual dispute about how the horses that are slaughtered at Cavel are treated prior to slaughter—because Cavel claims that the company has incentives to treat the horses well so that they pass inspection, but the amicus briefs, my goodness, they certainly suggest that these animals are treated very poorly in actual practice.

Mr. Calabrese: On that point, there are USDA inspectors on site at Cavel who monitor and enforce with respect to that and that testimony's in the record. With respect to the statements of the amici with which we disagree, that evidence was not properly before the district court, as we point out in our reply brief, and it's not properly before this Court either. So, I think there is no factual dispute on those issues. I'll reserve the balance of my time for rebuttal. Thank you.

Chief Judge Easterbrook: Certainly, Mr. Calabrese.

Chief Judge Easterbrook: Ms. Welsh.

Ms. Welsh: Good afternoon, Your Honors. May it please the Court. This is a case about federalism. It's about the state's right to choose between animal welfare and a commercial enterprise. The state's choice in this matter is subject to no second guessing, as long as there's some rational basis, then the statute must stand under both the . . .

Judge Posner: Why did the Governor say: it's past time to stop slaughtering horses in Illinois and sending their meat overseas? What's that about? It would be okay to slaughter them if their meat stayed here?

Ms. Welsh: Well no, Your Honor, of course, because the statute's a complete ban.

Judge Posner: I know. But so why does he say that? It's as if he thought it was particularly bad that this should be exported to gratify the decadent tastes of foreigners. Right? That struck me as odd. And your agriculture director said: there's no domestic market for horsemeat, and therefore, no need for this practice to continue in Illinois. Meat is being shipped overseas

to places like Belgium, France, and Japan. That makes it sound as if Illinoisans wanted to eat horses, well fine, then it'd be a domestic market . . .

Ms. Welsh: Well again, Your Honor, . . .

Judge Posner: . . . it'd be great.

Ms. Welsh: I mean, those are comments from the Department of Agriculture and the Governor, but in fact the statute that the General Assembly passed did in fact ban even the possession of horsemeat for human consumption within Illinois—not to mention sale, import, export. It's a complete and total ban.

Judge Posner: Is there a demand for horsemeat in Illinois?

Ms. Welsh: Not to my knowledge, and certainly not now because of the ban.

Judge Posner: No, I understand. But I don't think that's something . . .

Ms. Welsh: I mean there's no, you know, if there were a market . . .

Judge Posner: . . . Midwesterners eat.

Ms. Welsh: I'm sorry?

Judge Posner: I don't think Midwesterners eat horsemeat.

Ms. Welsh: No, and surely if there were a market, one would think that Cavel would sell to that market.

Judge Rovner: Miss, could the State of Illinois impose a tax on the importing or exporting of horsemeat that was so great that it would effectively shut down the market? In other words, what I'm doing is, I'm trying to get at the burden on foreign commerce because it seems to me that this statute

has the same effect as a truly prohibitive tax would have, and I'm not sure that a tax like that could stand.

Ms. Welsh: Your Honor, because this statute is a complete ban, it can't be treated like a tax that would be, you know, a burden on something that's being exported. And, as I think you noted earlier, the extraterritorial . . .

Judge Posner: Well, that's a strange argument.

Judge Rovner: But, I'm trying . . .

Chief Judge Easterbrook: [Inaudible] tax would be unconstitutional. The import/export clause says: states may not impose duties or imposts on imports or exports. The maximum tax Illinois can impose on horsemeat being exported is zero.

Ms. Welsh: I'm sorry, Your Honor. I thought we were talking about the commerce clause and extraterritorial effect.

Chief Judge Easterbrook: We don't need to ban taxes under the commerce clause if they're squarely and unambiguously banned by the import/export clause.

Ms. Welsh: I was trying to answer Judge Rovner's question, and I guess Judge Easterbrook answered it for me.

Judge Rovner: Well, I was trying to . . .

Chief Judge Easterbrook: [Inaudible] has to rest on Subsection A, right? Not like a tax because it's a total ban.

Ms. Welsh: Correct.

Judge Rovner: But, I was trying to ana . . .

Ms. Welsh: Analogize?

Judge Rovner: Analogize. Thank you. I was trying to analogize.

Ms. Welsh: To the taxes like in *Japan Line* or so?

Judge Rovner: Sure.

Ms. Welsh: Right. But *Japan Line* is completely inapposite because in there they were taxing, the state was taxing something that was a container that was used totally within foreign commerce. I mean, here, obviously, the horses come into Cavel. There's a lot of intrastate activity. The horses come into Cavel from brokers, primarily, or from individuals, but primarily from brokers. The horses are killed here. The meat is processed here. I mean, this is almost, you know, until you get to the step of the export, which is long after, you know, at the end of the chain, this is all intrastate activity and, as such, the commerce clause isn't even, you know, implicated.

Judge Rovner: Well, Congress, of course, made an express finding in the Meat Inspection Act and what Congress said was that: all animals and articles which are regulated under this chapter are either in interstate or foreign commerce and substantially affect such commerce. So, why doesn't that finding trigger more exacting scrutiny under the foreign commerce clause? I mean surely you're not suggesting that we're not bound by that finding?

Ms. Welsh: Right. But that finding has to do with the purpose of the Meat Inspection Act itself. And the purpose of that is to make sure that the products that go out are not, either within interstate commerce or foreign commerce, are not adulterated and that they're properly labeled and so on. The federal Meat Inspection Act, its central concern is the fact that meat be nationally uniform in terms of grade, how it's

inspected, how it's processed. It's not concerned with commerce in the way that we're talking, in terms of foreign commerce. The foreign commerce clause is concerned about an extraterritorial effect of a state, you know, the dormant foreign commerce clause, is concerned about the extraterritorial effect of a state law.

Judge Rovner: So simply burdening foreign commerce isn't enough to create any sort of problem, is that what you're saying?

Ms. Welsh: Well, Your Honor, if we're talking about the amendment, by its terms it doesn't burden foreign commerce. It burdens foreign comm—it burdens Cavel who has elected to exclusively export its, you know, its product.

Judge Rovner: But Congress, it seems, has already determined that horsemeat substantially affects foreign commerce, hasn't it?

Ms. Welsh: But in terms of, in terms of its quality, not in terms of what, you know, this is . . .

Judge Rovner: Simply on its quality?

Ms. Welsh: In terms of its quality, how it's inspected, how it's labeled, how it goes out. They want national standards for those things. But, that argument that Plaintiff makes would make it sound as though the federal Meat Inspection Act concerns what must be slaughtered, as opposed to how it is slaughtered. The focus, again, of the Meat Inspection Act is on meat inspection and general standards. It's not really, it's not on foreign and interstate commerce. It's just to ensure that materials that are put into foreign and interstate commerce are not adulterated and are in conformance with national standards, which is what the inspection does.

Judge Posner: What do you think happens to these horses, will happen to these horses, after Cavel is shut down?

Ms. Welsh: Well, I think one of the things that will happen is that there'll be less horse theft.

Judge Posner: Less what?

Ms. Welsh: Less horse theft.

Judge Posner: Horse theft?

Ms. Welsh: Horse theft? Yes. Because . . .

Chief Judge Easterbrook: Are rustlers still hanged in Illinois?

Ms. Welsh: No, sadly. As Your Honor noted, there's a financial incentive . . . I'm sorry—no, they are not to my knowledge. There's a financial incentive in this business to bring a horse, and this is what the district court found, too, that Illinois, the purpose of this statute, one of the rational bases . . .

Judge Posner: [There's] no evidence of horse theft, c'mon.

Ms. Welsh: Your Honor, there doesn't have to be evidence, empirical evidence for rational basis test. This is one of the reasons, for example, that the Fifth Circuit found that this was one of the justifications, sufficient justifications . . .

Judge Posner: Is there any evidence of horse theft? It sounds ridiculous because they're only getting $300. Now, what's involved in stealing the horse, transporting the horse, that doesn't sound like a profitable form of crime.

Judge Rovner: Also, of course, in the Fifth Circuit, you know you have all those western states where

there are more horses than there are people. Whereas, here in Illinois they're having to import the horse. I mean, there aren't enough horses.

Ms. Welsh: Right. Well, my understanding is that they imported them to Texas as well from other states. But, also my understanding is that in California, for example, when they put in the ban on horsemeat, that horse theft, and you wouldn't think of California as being as big a horse state as say Texas, dropped precipitously and so there is a market.

Judge Posner: You didn't refer to any of this in your brief, did you?

Ms. Welsh: I'm sorry?

Judge Posner: You didn't refer to any of this in your brief, did you?

Ms. Welsh: No, Your Honor. Because it wasn't before . . .

Judge Posner: Your brief was singularly devoid of any factual content whatsoever.

Ms. Welsh: Your Honor, again, the rational basis test doesn't require the state to put up empirical evidence of the bases that were or could have been the . . .

Judge Posner: Shouldn't the state give some reasons for thinking something is rational?

Ms. Welsh: Right. And the state . . .

Judge Posner: You didn't give any reason.

Ms. Welsh: Well certainly, Your Honor, during, well I think we did . . .

Judge Posner: You didn't even say in your brief that fewer horses would be killed.

Ms. Welsh: Well, Your Honor, it just stands to reason if the . . .

Judge Posner: No, it doesn't stand to reason, because these horses are going to be killed anyway.

Ms. Welsh: Well, Your Honor, that's not necessarily true, as the amici . . .

Judge Posner: You mean they are going to live forever?

Ms. Welsh: No. I mean . . .

Chief Judge Easterbrook: We have immortal horses . . .

Ms. Welsh: I'm sorry?

Chief Judge Easterbrook: We have immortal horses in Illinois, but for this statute?

Ms. Welsh: They won't be killed immediately, they would . . .

Judge Posner: How do you know? Look, you have a horse, and at some point you decide: this horse has had it. And if you're prepared to sell your beloved horse to the slaughterhouse, well you're prepared to do something else bad to it, aren't you?

Ms. Welsh: Well, Your Honor, . . .

Judge Posner: You don't want him any more. You want to get rid of him.

Ms. Welsh: Well, Your Honor, remember that most of the horses that come to Cavel come through brokers, and there was no evidence in the record that the people who sold to the brokers, actually, I mean, as opposed to the people who sold to Cavel . . .

Judge Posner: Well, there's not only horse theft, but there's some massive fraud?

Ms. Welsh: No, no.

Judge Posner: Brokers come to people and say: Gee, you know, your horse, we'd love to take your horse and . . .

Ms. Welsh: No, Your Honor. I mean they're usually at auctions, as I understand it. But, again, I mean . . .

Judge Posner: If you auction your horse, you're through with it. You could have no expectations that that horse is going to have a long, happy life after you've gotten rid of it.

Ms. Welsh: Well, not necessarily, Your Honor, because other people might buy it, I mean, that's what an auction is for. Other people might buy it and use it. Other people might decide to give it to a . . . they have some rescue ranches for horses.

Judge Posner: But they don't, right? Because these horses are sold to Cavel very cheap. If someone wanted a horse for riding, he's going to pay more than $300.

Ms. Welsh: I don't know that, Your Honor. I mean . . .

Judge Posner: You don't know anything, right? You're just—this is just a tissue of speculation because your conception of rational basis is: all you have to do is conjecture. You don't have any duty to—I don't mean to present trial type evidence—but, you know, to cite something which would say: yes, there's horse theft; yes, in the auction, Cavel's actually competing against people who would have this horse for riding and take care of it and so on. There well may be that sort of material, but you haven't looked for it.

Ms. Welsh: But, again, Your Honor, the question is: what could the general assembly have rationally believed at the time?

Judge Posner: What's worrisome about it, about the case, is it's a foreign-owned company exporting to a foreign country. So there's no real Illinois interest in this company and you have the angry neighbors, according to one of the amicus curiae briefs, who don't want to pay for a nuisance suit, so they go to the legislature. So, you know, there is at least a flavor here of kind-of ganging up against this foreign enterprise, foreign shareholders, foreign consumers, so there's no real Illinoisan to defend them, right? It's . . .

Ms. Welsh: Well, I mean . . .

Judge Posner: . . . a concern.

Ms. Welsh: Well, certainly, Your Honor. I mean, the Plaintiffs are not only Cavel, but they include also the individuals, so, I mean, there are people who . . .

Judge Posner: What individuals?

Ms. Welsh: The individual Plaintiffs . . .

Judge Posner: The individual employees?

Ms. Welsh: . . . employees . . .

Judge Posner: How many are there?

Ms. Welsh: . . . who have . . . Altogether?

Judge Posner: Yes.

Ms. Welsh: Approximately 60, I believe.

Judge Rovner: What is the state's primary justification for this statute? What purpose . . . what is the primary justification?

Ms. Welsh: Right. I think, as the legislative debates indicated to us, that the general assembly was concerned about the slaughter of what has come to be companion animals, and that not just that they're companion animals, but their nature when they are led to slaughter is different from cattle, from pigs, and so on. They're, you know, they're more flighty, they're more fragile and that, you know, given what actually—although the method that's used for slaughter is technically in compliance with federal law, it's how it's done that's the problem.

Judge Posner: You don't have any evidence as to how it's done. You don't know anything about that. You have some completely unsupported statement about the difference between chemical euthanasia and having a bolt through your forehead.

Ms. Welsh: Well, again, Your Honor, the question is: what did the General Assembly rationally believe would be the problem that would be . . .

Judge Posner: They rationally believe Bo Derek wants to save a few horses. That's what they seem to believe.

Ms. Welsh: Well, no, I mean, the question is: did the general assembly rationally believe that . . .

Judge Posner: Most of this . . . look, aren't most horses killed . . .

Ms. Welsh: Or die, sure.

Judge Posner: . . . rather than dying of old age?

Ms. Welsh: I mean, there are no immortal horses to my knowledge.

Judge Posner: No, aren't they killed rather than allowed to die of old age?

Ms. Welsh: I don't know that. I don't . . .

Judge Posner: Well that's kind of germane, isn't it?

Ms. Welsh: Well, not necessarily.

Judge Posner: I mean, [it's hard to believe] they're that altruistic about horses if they don't mind your killing your horse.

Ms. Welsh: Well, Your Honor, the General Assembly could have rationally believed that it was best to not have these tens of thousands of horses killed in this manner and this is the largest number of horses that are killed in any one process. I mean, usually, as you indicated earlier, as the Plaintiff indicated earlier, it's an individual decision and so people either decide to send their horse to a horse rescue place; they decide to kill the horse and have the guy come with a backhoe for $250 or, they, you know, these are the choices that the general assembly decided as a matter of public policy that they wanted to limit horse centers in Illinois to doing.

Judge Posner: Did the brokers ever furnish some of their horses to these rendering plants . . .

Ms. Welsh: I don't know.

Judge Posner: . . . into pet food?

Ms. Welsh: To my knowledge, there's—and the amici said this and I've asked the Department of Agriculture too—that horses aren't used for pet food these days and haven't been for some time.

Chief Judge Easterbrook: How about glue?

Ms. Welsh: Yes, and this is the difference, you know, for rendering, when you turn horses into glue and gelatin and all those other things . . .

Judge Posner: That's disgusting.

Ms. Welsh: Your Honor, it's life.

Chief Judge Easterbrook: Why is boiling horses better than cutting them up?

Ms. Welsh: Because those horses can be already dead by whatever more humane means.

Judge Posner: Can be? Can be?

Ms. Welsh: I'm sorry?

Judge Posner: What if they're not?

Ms. Welsh: I'm sorry, Your Honor?

Judge Posner: What if they're not dead when they reach the rendering plant?

Ms. Welsh: I don't . . .

Judge Posner: What happens to them?

Ms. Welsh: To my knowledge they're always dead when they reach the rendering plant.

Judge Posner: That's reassuring.

Ms. Welsh: But, so that's, you know, so then that's done in . . .

Chief Judge Easterbrook: Is the General Assembly of Illinois considering legislation to ban the slaughter and eating of chickens for human consumption? You know, the way in which chickens are raised and slaughtered . . .

Judge Posner: It's disgusting.

Chief Judge Easterbrook: . . . is a lot worse than the way in which these horses are slaughtered.

Ms. Welsh: Well, Your Honors know, the fois gras ban passed muster, at least in the district court and, no, the General Assembly is not intending to ban the slaughter of chickens and that would be a much harder burden.

Chief Judge Easterbrook: So, the principle that the legislators are using in Illinois is: we'll ban things that seem symbolic, but laws that might actually protect animal welfare will not be considered?

Ms. Welsh: No, Your Honor. I believe that, certainly there are federal laws with regard . . . there are poultry laws, just like there's a meat inspection law, and there are also state . . .

Chief Judge Easterbrook: Poultry inspection laws don't ensure that the poultry live long, happy, and productive lives. They ensure that they're safe and wholesome.

Ms. Welsh: But there are other state laws that ensure the humane treatment of all animals, whether they're being used for livestock or not. But this is, again, this is the difference: the, you know, poultry, cows, pigs, all of them are raised as livestock, they don't present the same policy choice to the General . . .

Chief Judge Easterbrook: I don't understand, this law seems to apply to horses raised as livestock.

Ms. Welsh: Horses are defined in Illinois as companion animals, and horses, generally speaking, are not raised to be eaten.

Chief Judge Easterbrook: No. Look, are you saying that this law, as written, would permit Cavel to open

a ranch next to its place and raise horses as livestock and slaughter them?

Ms. Welsh: No.

Chief Judge Easterbrook: All right. Then, why did you answer my question originally the way you did? This law bans the slaughter of horses for human consumption whether or not they are raised as livestock.

Ms. Welsh: Your Honor, what I'm trying to say is that horses are not raised as livestock and so . . .

Chief Judge Easterbrook: They haven't been raised as livestock in the past. If the state allowed it, I assume that it might be an economical thing to do.

Ms. Welsh: Well, certainly, Your Honor. I mean, it could be were it not for the total ban on horsemeat for human consumption and slaughtering. But again, I mean, this is . . . we have to go back to . . .

Chief Judge Easterbrook: There's been a long, as you may know, there's a long dispute in utilitarian theory about whether eating cows makes cows better off because there are an awful lot more of them than there would be if we couldn't eat them.

Ms. Welsh: Well, yes, that's certainly true, Your Honor, and . . .

Chief Judge Easterbrook: Why wouldn't that be true for horses as well?

Ms. Welsh: Because, again, Your Honor, . . .

Chief Judge Easterbrook: I don't see any reason to believe that the Illinois legislature carefully read Bentham before it enacted this law, but . . .

Ms. Welsh: Sadly, no, Your Honor. If I may finish?

Chief Judge Easterbrook: Sure.

Ms. Welsh: Unless the Court has other questions?

Chief Judge Easterbrook: Thank you very much, Ms. Welsh.

Ms. Welsh: Thank you, Your Honor. We ask you to affirm because the state did have a rational basis for this law. Thank you.

Chief Judge Easterbrook: Anything further Mr. Calabrese?

Mr. Calabrese: Just a couple points I wanted to address before closing. First, with respect to the state's argument on the Meat Inspection Act. The federal government in the Meat Inspection Act defines horses as food and the purpose of the Act is broader than the narrow reading that the state suggests. The purpose does extend, and this is in the discussion in our reply, to the identity of the meat and that's the ingredient preemption . . .

Judge Posner: But there's a difference between a premise and a command. They have the statute because, in fact, meat was being sold for human consumption. That doesn't mean that they want it always to be sold for human consumption, right?

Mr. Calabrese: Yes, but the background interpretative principle *Bank of Barnett* suggests that when the federal government gives permission, if they want to make that permission contingent, they know how to do that, and that's not the kind of inspection . . .

Judge Posner: Look, they impose a tax on illegal activities—income from illegal activities. That doesn't mean they're approving the illegal activities, they're saying: if these activities go on, we want our cut. Well, similarly, if there happens to be horse eating

they want it done, for our foreign relations with these countries, we want the horses to be healthy so we're not infecting foreigners. That doesn't mean that there's a federal policy of promoting or permitting the eating of horses.

Mr. Calabrese: Although, it would be unusual—if that were the case—for the USDA to have inspectors onsite at Cavel . . .

Various voices: [Inaudible]

Chief Judge Easterbrook: There's just nothing about agricultural inspections. Think about corporate mergers. There's elaborate federal regulations on corporate mergers under the securities laws and what shareholders get to vote on. Suppose the state bans mergers without unanimous consent of all the shareholders. That was the common law rule long ago. Would that violate federal law on the ground that if a merger occurs, it would have to comply with a whole bunch of federal rules?

Mr. Calabrese: Conceivably. I don't know enough about that area of the law.

Chief Judge Easterbrook: Well, it's not [just] conceivable. In fact, this court has held—Wisconsin passed such a law, requiring essentially unanimous consent for mergers—and we held it is perfectly consistent with federal law because one could, of course, comply with both. If you don't have any mergers, you're not violating federal law. Federal law just regulates what happens when a merger is proposed and it looks to me like federal law regulates what happens if somebody wants to slaughter horses to eat them but it doesn't compel anybody to slaughter horses.

Mr. Calabrese: Again, I would refer back to *Bank of Barnett* where the Supreme Court identified the principle: if the federal government gives permission and doesn't limit it. . . . To your question that you started to ask, until the last budget bill, the USDA paid for the inspectors. So, for the first 19 years Cavel was in operation . . .

Judge Rovner: I understand.

Mr. Calabrese: I see my time is up. Thank you very much.

Chief Judge Easterbrook: Okay, thank you very much to both counsel. The case is taken under advisement, and the Court will be in recess.

DECLARATION

Pursuant to 28 U.S.C. § 1746, I, Saber W. VanDetta, declare as follows:

1. I am over eighteen years of age and make this Declaration upon personal knowledge. If called as a witness, I am competent to testify as to the matters stated herein.

2. I am a member of the Ohio Bar and an associate with the law firm of Squire, Sanders & Dempsey L.L.P., 4900 Key Tower, 127 Public Square, Cleveland, Ohio 44114.

3. I have transcribed the oral argument that took place in the United States Court of Appeals for the Seventh Circuit on August 16, 2007 in the case captioned *Cavel International, Inc., et al. v. Madigan, et al.*, Case No. 07-2658.

4. The foregoing argument transcript is true and accurate to the best of my ability.

5. To the extent the Court has any question about the content of the foregoing transcript, a digital audio file of the oral argument is also available via the website for the United States Court of Appeals for the Seventh Circuit:

> http://www.ca7.uscourts.gov/fdocs/docs.fwx?caseno=07-2658&submit=showdkt&yr=07&num=2658 (last visited on January 17, 2008).

I declare under penalty of perjury that the foregoing is true and correct. Executed on January 17, 2008.

/s/ Saber W. VanDetta
SABER W. VANDETTA